Petition

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No.

IN THE
Supreme Court of the United States
October Term, 1981

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether jurisdiction to enjoin strike activity in the federal sector is vested exclusively in the Federal Labor Relations Authority by Title VII of the Civil Service Reform Act of 1978.

2. Whether injunctive relief against federal sector strike activity is available under 5 U.S.C. § 7311.*

*The parties to the proceeding in the Seventh Circuit below were as follows: The United States of America, Plaintiff-Appellant; The Professional Air Traffic Controllers Organization (PATCO); PATCO O'Hare Local #316 (PATCO O'Hare); the officers, agents, directors, managers, servants and members of both PATCO and PATCO O'Hare; John M. Paolino; Richard L. Scholz; Tom Brockett; John Doe and Richard Roe, Defendants-Appellees.

All Defendants-Appellees join in this petition.

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners Professional Air Traffic Controllers Organization, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 18, 1981.

OPINIONS BELOW

The opinions of the Court of Appeals, reported at 107 LRRM 3057, and of the United States District Court for the Northern District of Illinois, reported at 504 F.Supp. 432, *supplemental opinion,* 504 F.Supp. 442, are reproduced in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit was entered on June 18, 1981, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The following statutes are involved in this case: Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, Stat. 1111, 5 U.S.C. §§ 7101-7135; 5 U.S.C. § 7311; 18 U.S.C. § 2; 18 U.S.C. § 1918; 28 U.S.C. § 1345; and 29 U.S.C. §§ 151, 153(a), (d), 157, 160(a)-(j). The text of these provisions is reproduced in the Appendix hereto.

STATEMENT OF THE CASE

The Professional Air Traffic Controllers Organization ("PATCO") is the labor organization recognized as the exclusive bargaining agent for the nation's air traffic controllers, who are employees of the Federal Aviation Administration ("FAA"), within the Department of Transportation. PATCO Local No. 316 is one of PATCO's local affiliates, representing controllers in the FAA's Chicago O'Hare facilities. The individual petitioners are officers of PATCO or of Local No. 316.

On August 18, 1980, the respondent United States sued petitioners in the United States District Court for the Northern District of Illinois. The complaint alleged that the individual petitioners, aided and abetted by each other, and PATCO and local No. 316, aided and abetted by the individual petitioners, had engaged in strike activity against the United States, and that such activity was illegal under 5 U.S.C. § 7311. Jurisdiction was alleged to exist under 28

U.S.C. § 1345. A temporary restraining order was issued and subsequently extended by consent until January 20, 1981.

On December 15, 1980, the district court, Milton I. Shadur, J., dismissed the complaint for lack of subject matter jurisdiction, holding that, under Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135, jurisdiction to adjudicate and enjoin federal sector labor union strike activity lies exclusively in the Federal Labor Relations Authority ("FLRA"). The court noted that Congress intentionally modelled the FLRA after the National Labor Relations Board ("NLRB"). The court reasoned, therefore, that, like the NLRB, the FLRA was intended to have *exclusive* jurisdiction over conduct constituting an unfair labor practice. (The court cited, *inter alia, San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 248 (1959), and *Amalgamated Association of Street Electrical Ry. & Motor Coach Employees v. Lockridge,* 403 U.S. 274, 292 (1971).) The court concluded that, because it is an unfair labor practice under Title VII for a labor union to enage in strike activity, 5 U.S.C. § 7116(b)(7), the federal courts have no subject matter jurisdiction over such activity.[1] The court acknowledged that injunctions against federal labor union strike activity had been issued on three reported occasions before 1978,[2] but it held that these decisions did not survive the enactment in that year of the Civil Service Reform Act.

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[1]The court recognized, however, that, under the specific provisions of 5 U.S.C. § 7123(d), the federal district courts do have jurisdiction to enjoin such conduct temporarily in an action brough by the FLRA, pending administrative adjudication of the dispute.

[2]*Air Transport Ass'n v. PATCO,* 313 F.Supp. 181 (E.D. N.Y.), *rev'd in part on other grounds sub nom. United States v. PATCO,* 438 F.2d 79 (2d Cir. 1970), *cert. denied,* 402 U.S. 915 (1971); *United States v. Branch 60, National Ass'n of Letter Carriers,* 312 F.Supp. 619 (D. Conn. 1970); *TVA v. Local 110, Sheet Metal Workers International Ass'n,* 233 F.Supp. 997 (W.D. Ky. 1962).

On December 19, 1980, the district court issued a supplemental opinion clarifying that the complaint was dismissed as to the individual defendants as well as to the labor organization defendants. The court explained that, in its view, the FLRA's exclusive jurisdiction encompassed not only alleged strike activity by federal sector labor unions, but also such activity by the officers of such unions on behalf of the unions. It also stated that, because violation of 5 U.S.C. § 7311 constitutes a crime, 18 U.S.C. § 1918, the equitable doctrine that the commission of a crime will not be enjoined barred injunctive relief against violation of § 7311.

The United States appealed, and on June 18, 1981, the United States Court of Appeals for the Seventh Circuit reversed. The Seventh Circuit held that, contrary to the district court's conclusion, the enactment of Title VII had no effect on the preexisting case law under which federal sector labor union strike activity had been enjoined. The court held that the FLRA's jurisdiction over federal sector labor union strike activity was not exclusive, because such activity not only constitutes an unfair labor practice, but is independently illegal under a separate federal statute, 5 U.S.C. § 7311.

Additionally, the Seventh Circuit held that, as a matter of policy, the United States should not be required to depend only on the procedures of 5 U.S.C. § 7123(d), under which the FLRA may obtain temporary injunctive relief against federal sector labor union strike activity. Rather, the court believed that the United States should be allowed to seek an injunction against such strike activity directly, through a suit initiated and prosecuted by the Department of Justice.

Finally, the court held that, under 5 U.S.C. § 7311,

striking federal workers may be enjoined and ordered back to work, even though that provision prohibits anyone who has participated in a strike against the United States from holding a federal position, and despite the general principle that crimes will not be enjoined.

On remand from the Court of Appeals, further proceedings in the district court have been adjourned until after oral argument in *Air Transport Association v. PATCO*, No. 81-7447 (2d Cir., filed June 19, 1981), a case involving a similar question of federal court jurisdiction over federal sector labor union strike activity.

REASONS FOR GRANTING THE WRIT[3]

I. THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING THE PROPER REMEDIES FOR FEDERAL SECTOR STRIKES

This Court held in 1947 that the restrictions of the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, on labor injunctions do not apply to strikes by federal workers. *United States v. United Mine Workers*, 330 U.S. 258

[3]Petitioner PATCO is party to a pending appeal in the United States Court of Appeals for the Second Circuit raising an issue similar to the question involved here. *Air Transport Association v. PATCO*, No. 81-7447 (2d Cir., filed June 19, 1981). That case also deals with whether the FLRA's jurisdiction over federal sector labor union strike activity is exclusive. (The plaintiffs in that case are private parties, however, not the United States.)

Oral argument in the *Air Transport Association* case has been tentatively scheduled for the week of September 21, 1981. If the Second Circuit rules in favor of PATCO on that issue, a conflict will have arisen between that decision and the instant decision of the Seventh Circuit. Petitioners therefore respectfully urge that this Court not act on this petition until the Second Circuit decides PATCO's appeal, in order that this Court have the benefit of the Second Circuit's opinion in deciding whether to grant *certiorari* in the instant case.

(1947). In fact, federal sector employment represents perhaps the broadest exception to the Norris-LaGuardia Act. Yet this Court has had no occasion since 1947 to consider what factors properly bear on the issuance of federal sector labor injunctions.

At the time that the *United Mine Workers* case was decided, there was no generally applicable statute dealing specifically with federal sector strikes.[4] Since that time, union representation in the federal sector has grown enormously,[5] and two statutes relating expressly to federal sector strikes have been enacted. The first statute, now codified at 5 U.S.C. § 7311, applies to individual federal employees. It provides, in pertinent part, that "[a]n individual may not accept or hold a position in the Government of the United States . . . if he . . . participates in a strike . . . against the Government of the United States . . ." The second statute, Title VII of the Civil Service Reform Act of 1978 ("Title VII"), 5 U.S.C. §§ 7101-7135, is directed toward federal sector labor organizations, rather than toward individual federal employees. It established a comprehensive administrative scheme to regulate federal sector labor-management relations, including strikes.

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[4]The Third Urgent Deficiency Appropriations Act of 1946, Pub.L. No. 79-419, § 201, 60 Stat. 262, 268-69, dealt with federal sector strikes, but that provision was limited in application to employees paid from funds appropriated by the Act.

The first generally applicable provision dealing with federal sector strikes was enacted several months after the *United Mine Workers* case was decided. Taft-Hartley Act, Pub.L. No. 80-101, § 305, 61 Stat. 136, 160 (June 23, 1947).

[5]The percentage of federal employees covered by a negotiated agreement has increased from 6% in 1964 to 57% in 1980. "Union Recognition in Federal Government, 1980," *Gov't Employee Rel. Rep.* (BNA) Reference File 71:201,222.

Each of these statutes calls into question the continued availability of permanent injunctive relief against federal sector strikes. Injunctive relief in the form of a back-to-work order to individual striking employees is problematical in light of 5 U.S.C. § 7311's unequivocal command that a striking federal employee "may not accept or hold a position in the Government of the United States. . . ." And Title VII raises serious questions as to the jurisdiction of federal district courts over strike activity in the federal sector, because the statute established an administrative agency (the FLRA) in which exclusive jurisdiction over federal sector unfair labor practices is vested.[6]

The Norris-LaGuardia Act represents a fundamental policy determination that labor injunctions present issues of unusual sensitivity. Although the Norris-LaGuardia Act is not itself applicable to federal employees, labor injunctions in the federal sector possess much the same sensitivity as do labor injunctions in the private sector. It is thus especially inappropriate that issues having to do with labor injunctions in the federal sector be allowed to remain unsettled. This case presents these issues squarely for perhaps the first time.[7]

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[6]The United States has successfully argued in two cases outside the strike context that the FLRA has exclusive jurisdiction over unfair labor practices. *National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute,* 493 F.Supp. 675 (N.D. Cal. 1980); *Clark v. Mark,* No. 79-CV-777 (N.D. N.Y. August 27, 1980).

[7]Preliminary injuctions against federal sector strikes were granted in three reported cases prior to the enactment of Title VII, as mentioned *supra. Air Transport Ass'n v. PATCO,* 313 F.Supp. 181 (E.D. N.Y.), *rev'd in part on other grounds sub non. United States v. PATCO,* 438 F.2d 79 (2d Cir. 1970), *cert. denied,* 402 U.S. 915 (1971); *United States v. Branch 60, Nat'l Assn' of Letter Carriers,* 312 F.Supp. 619 (D. Conn. 1970); *TVA v. Local 110, Sheet Metal*

The importance of resolving the issues this case poses is not limited to the immediate outcome of this lawsuit. There are matters of broader significance to PATCO and to the United States Government at stake. PATCO is alleged to have called, condoned, and participated in a nationwide strike of air traffic controllers beginning on August 3, 1981. The United States has brought approximately 100 separate actions across the country against PATCO, seeking to enjoin this alleged strike. Several actions have been filed by private parties. PATCO intends to raise the issues involved here in each of these cases. It will require an enormous expenditure of the resources of PATCO, of the United States, and of the federal courts to litigate these issues separately in dozens of identical actions in the district courts, and then by identical appeals in each judicial circuit. The instant case provides this Court the opportunity to give the lower courts authoritative guidance, and thus to make extensive duplicative litigation unnecessary.[8]

Moreover, the significance of the instant case is not limited to just the immediate parties. Other federal sector labor unions have participated in strikes in the past, the il-

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Workers International Ass'n, 233 F.Supp. 997 (W.D. Ky. 1962). In some of these cases, the injunctions were entered pursuant to consent. In none of the decisions is there any illuminating discussion of whether injunctive relief was properly available.

[8]PATCO has moved before the Judicial Panel on Multidistrict Litigation to consolidate these actions for pretrial purposes. *In re Professional Air Traffic Controllers Organization Litigation*, MDL Docket No. 480 (J.P.M.L., filed Aug. 13, 1981). The United States has opposed this motion. If the cases are not consolidated, they will proceed separately through the district and circuit courts. If they are consolidated, but the transferee court does not grant PATCO's motion to dismiss or for summary judgment, the actions will be remanded to the transferor courts for separate trial, judgment, and appeal.

legality of such strikes notwithstanding. According to Bureau of Labor Statics figures, 22 work stoppages have occurred within the federal labor force from 1962 through 1979.[9] As recently as this past summer, several postal workers unions, representing half a million federal employees, threatened to engage in an illegal strike.[10] Additionally, the National Treasury Employees Union, representing roughly 100,000 employees, is reportedly planning for the possibility of a strike yet to come.[11] The

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[9]"Work Stoppages in Government, 1979," *Gov't Employee Rel. Rep.* (BNA) Reference File 71:1011, 1014. The specific figures are as follows:

Year	Number of Stoppages	Workers Involved
1962	5	4,200
1968	3	1,700
1969	2	600
1970	3	195,800
1971	2	1,000
1973	1	500
1974	2	500
1976	1	fewer than 100
1977	2	400
1978	1	4,800

During the same period, there were thousands of work stoppages by state and local public employees, *id.*, even though such strikes are generally illegal.

[10]"Postal Service and APWU, NALC Agree After Marathon Sessions," *Gov't Employee Rel. Rep.* (BNA) No. 922 at 5 (July 27, 1981). Postal workers are not covered by Title VII of the Civil Service Reform Act. *See* 39 U.S.C. § 1209. They are, however, covered by 5 U.S.C. § 7311, which excludes from federal employment anybody who strikes against the federal government. Thus, the example of the postal workers unions is evidence that many federal workers are willing to go on strike when collective bargaining fails.

[11]"NTEU Convention Delegates Vote Themselves Closer to Militancy," *Gov't Employee Rel. Rep.* (BNA) No. 925 at 5-6 (Aug. 17, 1981); "NTEU to Plan Strike, Backs PATCO Step," *Federal Times*, Sept. 7, 1981, at 4 col. 3.

possibility of significant labor-management disputes in the federal sector, including further strikes, is a real one, and the issues involved here are thus of importance to the entire federal workforce and to every Federal agency.

II. THE DECISION BELOW CASTS DOUBT ON THE SCOPE OF FLRA EXCLUSIVE JURISDICTION OVER UNFAIR LABOR PRACTICES OTHER THAN STRIKES

The government has argued successfully in cases not involving strikes that the FLRA's jurisdiction over conduct arguably constituting an unfair labor practice is exclusive. *National Federation of Federal Employees Local 1263 v. Commandant, Defense Language Institute,* 493 F.Supp. 675 (N.D. Cal. 1980); *Clark v. Mark,* No. 79-CV-777 (N.D.N.Y. August 27, 1980). Thus, the position of the United States seems to be that federal sector labor union strike activity represents the sole exception to the general rule of FLRA exclusive jurisdiction over unfair labor practices. It may be, however, that once an exception is created for strike activity, similar exceptions will have to be recognized for other unfair labor practices.

For example, in a suit by the government as management to enjoin strike activity by a federal sector labor union, the defense of "unclean hands" presumably will be available to the union. Could the union therefore show that the government was not entitled to equitable relief because it had precipitated the strike by its unfair labor practices? The union might argue, for example, that the agency had refused to bargain with it in good faith, 5 U.S.C. § 7116(a)(5), or that it had interfered with employees' right to join or assist a labor organization, *id.* § 7116(a)(1). Generally, such contentions would be exclusively within the jurisdiction of the FLRA. It might well

be held, however, that management having resorted directly to the courts, the union should be entitled to defend itself on an equal footing. In such a situation, the federal court might exercise pendant jurisdiction over the union's unfair labor practice charge.

By recognizing one exception to the general rule of FLRA exclusive jurisdiction, therefore, the Seventh Circuit in this case may well have thrown the door open to further exceptions. If so, the consequence will be a major change, if not disruption, of the administrative scheme that Congress created when it passed Title VII. Thus, the impact of this case is not limited to strike activity. Rather, the question involved here affects the resolution of a wide range of labor-relations issues in the federal sector.

III. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH AN EARLIER DECISION OF THE SECOND CIRCUIT

Another reason for granting *certiorari* in this case is that the Court of Appeals' decision below is inconsistent with the decision of the Second Circuit in *Buckley v. American Federation of Television and Radio Artists,* 496 F.2d 305 (2d Cir.), *cert. denied,* 419 U.S. 1093 (1974). In *Buckley,* a case arising in the private sector, radio and television commentator William F. Buckley and others contended that their first amendment rights were violated by provisions in the broadcasting stations' collective bargaining agreements requiring them to join the American Federation of Television and Radio Artists and subject themselves to union discipline. The Second Circuit held that, because this contention arguably amounted to an allegation of an unfair labor practice under the National Labor Relations Act 29 U.S.C § 158(a)(3), the district court had no jurisdiction over the constitutional claim. The Court of Appeals relied

on the *Garmon* doctrine, under which conduct constituting or arguably constituting an unfair labor practice is within the exclusive jurisdiction of the NLRB. 496 F.2d at 312-13 (citing *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959)).

The *Buckley* decision thus stands for the proposition that the federal courts may not exercise jurisdiction over matters otherwise within the exclusive jurisdiction of the NLRB merely because the conduct in question is also alleged to be illegal under an independent source of federal law.[12]

The Seventh Circuit held in the instant case, however, that, assuming the *Garmon* doctrine to be generally applicable to federal sector labor-management relations, it was nevertheless inapplicable to labor union strike activity. The court explained that "the work slowdown involved in the instant case is not only an unfair labor practice but

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[12] *Accord, Iowa Beef Processors, Inc. v. Gorman,* 476 F.Supp. 1382 (N.D. Iowa 1979) (conduct constituting unfair labor practice also constituted violation of 42 U.S.C. § 1985(3)); *Amalgated Clothing and Textile Workers v. J.P. Stevens & Co.,* (conduct constituting unfair labor practice also constituted violation of 42 U.S.C. § 1983), *vacated as moot,* 638 F.2d 7 (2d Cir. 1980).

As far as we can determine, exceptions to the *Garmon* doctrine have been recognized on the ground that the conduct in question was covered by a federal statute other than the National Labor Relations Act only where the other statute *expressly* provided for a judicial remedy. *E.g., International Brotherhood of Boilermakes v. Hardeman,* 401 U.S. 233 (1971) (Labor-Management Reporting and Disclosure Act, § 102, 29 U.S.C. § 412); *Smith v. Evening News Ass'n.,* 371 U.S. 195 (1962) (Taft-Hartley Act, § 301, 29 U.S.C. § 185); *Bernstein v. Universal Pictures, Inc.,* 517 F.2d 976 (2d Cir. 1975) (antitrust laws, *see* 15 U.S.C. § 15); *Marriott Corp. v. Great America Services Trade Council,* 552 F.2d 176 (7th Cir. 1977) (trademarks laws, *see* 15 U.S.C. § 1114).

is also prohibited by a separate statute, 5 U.S.C. § 7311." App. 982. This view is entirely inconsistent with that of the Second Circuit in *Buckley, supra.*

Moreover, since the Seventh Circuit's decision necessarily – if implicitly – represents a holding as to the scope of the *Garmon* doctrine, its effects is not limited to federal sector labor-management relations, but extends as well to private sector labor-management relations under the National Labor Relations Act. This is so because the intentional analogy between the NLRB and the FLRA cannot be a one-way street. Once it is accepted that the *Garmon* doctrine applies to Title VII of the Civil Service Reform Act,[13] decisions under Title VII dealing with the doctrine will also be relevant as precedent under the National Labor Relations Act.

The inconsistency between the decisions of the Seventh Circuit in the instant case and the Second Circuit in *Buckley* thus casts uncertainty on the scope and effect of the *Garmon* doctrine in the private sector. This Court should resolve that uncertainty by granting *certiorari* in this case.

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[13]As noted at note 6, *supra,* the United States has argued vigorously – and successfully – that the *Garmon* doctrine does so apply. *See National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute,* 493 F.Supp. 675 (N.D. Cal. 1980); *Clark v. Mark,* No. 79-CV-777 (N.D. N.Y. August 27, 1980).

CONCLUSION

For the reasons stated, this Court should grant a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Civil Service Reform Act of 1978,
Pub. L. No. 95-454, 92 Stat. 1111

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SUBCHAPTER I – GENERAL PROVISIONS

§ 7101. Findings and purpose

(a) The Congress finds that –

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them –

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1192.)

§ 7102. Employees' rights

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right—

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representative

chosen by employees under this chapter.

(Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1192.)

§ 7103. Definitions; application

(a) For the purpose of this chapter—

(1) "person" means an individual, labor organization, or agency;

(2) "employee" means an individual—

(A) employed in an agency; or

(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority; but does not include—

(i) an alien or noncitizen of the United States who occupies a position outside the United States;

(ii) a member of the uniformed services;

(iii) a supervisor or a management official;

(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency; or

(v) any person who participates in a strike in violation of section 7311 of this title;

(3) "agency" means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Veterans' Administration), the Library of Con-

gress, and the Government Printing Office, but does not include–

(A) the General Accounting Office;
(B) the Federal Bureau of Investigation;
(C) the Central Intelligence Agency;
(D) the National Security Agency;
(E) the Tennessee Valley Authority;
(F) the Federal Labor Relations Authority; or
(G) the Federal Service Impasses Panel;

(4) "labor organization" means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment, but does not include–

(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

(C) an organization sponsored by an agency; or

(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

(5) "dues" means dues, fees, and assessments;

(6) "Authority" means the Federal Labor Relations Authority described in section 7104(a) of this title;

(7) "Panel" means the Federal Service Impasses Panel described in section 7119(c) of this title;

(8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee, labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

(10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those individuals who devote a preponderance of their employment time to exercising such authority;

(11) "management official" means an individual employed by an agency in a position the duties and

responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

(12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

(13) "confidential employee" means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute;

(15) "professional employee" means—

(A) an employee engaged in the performance of work—

(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities;

(ii) requiring the consistent exercise of discretion and judgment in its performance;

(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

(16) "exclusive representative" means any labor organization which—

(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit –

(i) on the basis of an election, or

(ii) on any basis other than an election, and continues to be so recognized in accordance with the provisions of this chapter;

(17) "firefighter" means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

(18) "United States" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that –

(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

(2) The President may issue an order suspending any provision of this chapter with respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines

that the suspension is necessary in the interest of national security. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1192.)

§ 7104. Federal Labor Relations Authority

(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority.

(c)(1) One of the original members of the Authority shall be appointed for a term of 1 year, one for a term of 3 years, and the Chairman for a term of 5 years. Thereafter, each member shall be appointed for a term of 5 years.

(2) Notwithstanding paragraph (1) of this subsection, the term of any member shall not expire before the earlier of—

(A) the date on which the member's successor takes office, or

(b) the last day of the Congress beginning after the date on which the member's term of office would (but for this subparagraph) expire.

An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced.

(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

(f)(1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or possition in the Government of the United States except as provided by law.

(2) The General Counsel may—

(A) investigate alleged unfair labor practices under this chapter,

(B) file and prosecute complaints under this chapter, and

(C) exercise such other powers of the Authority as the Authority may prescribe.

(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1196.)

§ 7105. Powers and duties of the Authority

(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

(b) The Authority shall adopt an official seal which shall be judicially noticed.

(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

(e)(1) The Authority may delegate to any regional director its authority under this chapter—

(A) to determine whether a group of employees is an appropriate unit;

(B) to conduct investigations and to provide for hearings;

(C) to determine whether a question of representation exists and to direct an election; and

(D) to supervise or conduct secret ballot elections and certify the results thereof.

(2) The Authority may delegate to any administrative

law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engated in or is engaging in an unfair labor practice.

(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—

(1) the date of the action; or

(2) the date of the filing of any application under this subsection for review of the action; the action shall become the action of the Authority at the end of such 60-day period.

(g) In order to carry out its functions under this chapter, the Authority may—

(1) hold hearings;

(2) administer oaths, take the testimony or deposition of any person under oath and issue subpenas as provided in section 7132 of this title; and

(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys

designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1196.)

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating–

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

(Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1198.)

SUBCHAPTER II – RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

§ 7111. Exclusive recognition of labor organizations

(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

(b) If a petition is filed with the Authority–

(1) by any person alleging–

(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

(c) A labor organization which–

(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit; or

(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

(f) Exclusive recognition shall not be accorded to a labor organization —

(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

(2) in the case of a petition filed pursuant to subsection (b)(1)(A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless–

(A) the collective bargaining agreement has been in effect for more than 3 years, or

(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the of the collective bargaining agreement; or

(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1199.)

§ 7112. Determination of appropriate units for labor organization representation

(a)(1) The Authority shall determine the appropriateness of any unit. The Authority shall determine

in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved.

(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

(1) except as provided under section 7125(a)(2) of this title, any management official or supervisor;

(2) a confidential employee;

(3) an employee engaged in personnel work in other than a purely clerical capacity;

(4) an employee engaged in administering the provisions of this chapter;

(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

(1) which represents other individuals to whom such provision applies; or

(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1200.)

§ 7113. National consultation rights

(a)(1) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organization's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

(b)(1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall—

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) be permitted reasonable time to present its views and recommendations regarding the changes.

(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization—

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1201.)

§ 7114. Representation rights and duties

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

(B) exercising grievance or appellate rights established by law, rule, or regulation; except in the

case of grievance or appeal procedures negotiated under this chapter.

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative,upon request and, to the extent not prohibited by law, data—

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1202.)

§ 7115. Allotments to representatives

(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

(b) An allotment under subsection (a) this section for the deduction of dues with respect to any employee shall terminate when –

(1) the agreement between the agency and the exclusive representative involved cases to be applicable to the employee; or

(2) the employee is suspended or expelled from membership in the exclusive representative.

(c)(1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

(2)(A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

(B) Any agreement under paragraph (1) of this subsection between a labor organization and an agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1203.)

§ 7116. Unfair labor practices

For the purpose of this chapter, it shall be an unfair labor practice for an agency –

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization —

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affilation, marital status, or handicapping condition;

(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

(7)(A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure –

(1) to meet reasonable occupational standards uniformly required for admission, or

(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

(e) The expression of any personal view, argument, opinion or the making of any statement which –

(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election,

(2) corrects the record with respect to any false or misleading statement made by any person, or

(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expresssion contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1204.)

§ 7117. Duty to gargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargaining in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive

representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority, shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if –

(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

(3) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargain-

ing with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by –

(A) filing a petition with the Authority; and

(B) furnishing a copy of the petition to the head of the agency.

(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall –

(A) file with the Authority a statement –

(i) withdrawing the allegation; or

(ii) setting forth in full its reasons supporting the allegation; and

(B) furnish a copy of such statement to the exclusive representative.

(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

(2) A labor organization having consultation rights under paragraph (1) of this subsection shall –

(A) be informed of any substantive change in conditions of employment proposed by the agency, and

(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization –

(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

(Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1205.)

§7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge dur-

ing the 6-month period referred to in subparagraph (A) of this paragraph by reason of–

(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period, the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extend practicable, be conducted in accordance with the provisions of subchapter II of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the

preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management. (Pub. L. 95-454, Oct. 13 1978, 92 Stat. 1207.)

§ 7119. Negotiation impasses; Federal Service Impasses Panel

(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

(b) If voluntary arrangements including the services of the Federal Mediation and Conciliation Service or any other third party mediation, fail to resolve a negotiation impasse–

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

(c)(1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals

who are familiar with Government operations and knowledgeable in labor-management relations.

(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is entitled to travel expenses as provided under section 5703 of this title.

(5)(A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

(i) recommend to the parties procedures for the resolution of the impasse; or

(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

(i) hold hearings;

(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement unless the parties agree otherwise. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1208.)

§ 7120. Standards of conduct for labor organizations

(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences opposed to basic democratic principles if there is reasonable cause to believe that –

(1) the organization has been suspended or expelled from, or is subject to other sanctions, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

(2) the organization is in fact subject to influences that would preclude recognition under this chapter.

(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the prin-

ciples applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation—

(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

(2) take any other appropriate disciplinary action.

(Pub.L. 95-454, Oct. 13 1978, 92 Stat. 1210.)

SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

§ 7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection any collective bargaining agreement shall pro-

vide procedures for the settlement of grievances, including question of arbitrability. Except as provided in (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance in the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit Systems Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those

matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title as applicable.

(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under the applicable appellate procedures. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1211; amended Pub.L. 96-54, Aug: 14, 1979, 93 Stat. 383.)

§ 7122. Exceptions to arbitral awards

(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award

relating to a matter described in section 7121 (f) of this title). If upon review the Authority finds that the award is deficient –

(1) because it is contrary to any law, rule, or regulation; or

(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules or regulations.

(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title). (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1212.)

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under –

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the

facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed. (Pub. L. 95-454, Oct 13, 1978, 92 Stat. 1213.)

SUBCHAPTER IV – ADMINISTRATIVE AND OTHER PROVISIONS

§ 7131. Official time

(a) Any employee representing an exclusive represen-

tative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest. (Pub. L. 95—454, Oct. 13, 1978, 92 Stat. 1214.)

§ 7132. Subpenas

(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may—

(1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and

(2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

(b) In the case of contumacy or failure to obey a subpena issued under subsection (a)(1) of this section, the United States district court for the judicial district in which the person to whom the subpena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mileage allowances which are paid subpenaed witnesses in the courts of the United States. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1214.)

§ 7133. Compilation and publication of data

(a) The Authority shall maintain a file of its proceedings

and copies of all available agreements and arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.

(b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1215.)

§ 7134. Regulations

The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision or repeal of any such rule or regulation. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1215.)

§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

(a) Nothing contained in this chapter shall preclude—

(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

(2) the renewal, continuation, or initial according of recognition for units of management officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter. (Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1215.)

5 U.S.C. § 7311: Loyalty and striking

An individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he –

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

18 U.S.C. § 2: Principals

(a) Whoever commits an offense against the United States or aids abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1918: Disloyalty and asserting the right to strike against the Government

Whoever violates the provision of section 7311 of title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia if he—

(1) advocates the overthrow of our constitutional form of government;

(2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;

(3) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; or

(4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia;

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

28 U.S.C. §1345: United States as plaintiff

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

National Labor Relations Act 29 U.S.C. § 151 *et seq.*:

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions in industry by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as

to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

§ 153. National Labor Relations Board – Creation, composition, appointment, and tenure; Chairman; removal of members

(a) The National Labor Relations Board (hereinafter called the "Board") created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947, is continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional

members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member ot serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

* * *

General Counsel: appointment and tenure; powers and duties; vacancy

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted

to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted.

* * *

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

* * *

§ 160. Prevention of unfair labor practices — Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting

commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so

far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon

the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Modification of findings or orders prior to filing record in court

(d) Until the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals

to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole

shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as herein above provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by

substantial evidence on the record considered as a whole shall in like manner be conclusive.

Institution of court proceedings as stay of Board's order

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

Jurisdiction of courts unaffected by limitations prescribed in sections 101 to 115 of this title

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcement, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title.

Expeditious hearings on petitions

(i) Petitions filed under this subchapter shall be heard expeditiously, and if possible within ten days after they have been docketed.

Injunctions

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any

such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * *

APPENDIX B

504 F. Supp. 432

UNITED STATES of America, Plaintiff,

v.

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION (PATCO) et al., Defendants.

No. 80 C 4390.

United States District Court, N.D. Illinois, E.D.

Dec. 15, 1980.

Thomas P. Sullivan, U.S. Atty., Frederick H. Branding, Linda A. Wawzenski, Asst. U.S. Attys., Chicago, Ill., for plaintiff.

Richard J. Leighton, Leighton, Conklin, Lemov & Jacobs, Gary Ethan Klein, Washington, D.C., Harvey Nathan, Chicago, Ill., for defendants.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

This case of first impression requires a resolution of the tension between the forces supporting *judicial* control over the congressional policy against strikes by federal employees and the forces supporting the congressional policy for *administrative* resolution of unfair labor practices by federal employees' labor unions. Defendants Professional Air Traffic Controllers Organization and its O'Hare Local No 316 (though they are separate entities, for convenience this opinion will refer to them collectively by use of the singular term "PATCO") and a number of their officers have been sued by the United States for a preliminary and permanent injunction against a claimed slowdown (alleged to be equivalent to a strike) of air traffic controllers at Chicago's O'Hare Field. PATCO has moved to dismiss the action for lack of jurisdiction. For the reasons stated in this memorandum opinion and order PATCO's motion is granted.

Facts[1]

PATCO is a labor organization representing air traffic controller employees of the Federal Aviation Administration ("FAA"). On July 31, 1980 PATCO, aided and abetted by the individual defendants, organized and directed a concerted slowdown of the air traffic controllers working at Chicago's O'Hare International Airport. That slowdown is characterized as a "strike" against the operations of the air traffic control system, creating a concerted obstruction to the movement of air traffic within this District and throughout substantial areas of the United States. It has significantly impaired such operations and air traffic movement, causing great loss and inconvenience to the public and the airlines.

When the United States brought this action August 18, 1980 Judge Bua of the Court entered a temporary restraining order prohibiting PATCO, the individual defendants and PATCO's members from "continuing, encouraging, ordering, aiding, engaging, obstructing or taking any part in any work stoppage or slowdown" (TRO#1(a)). Since that time the parties have consented to the extension of the TRO from time to time, most recently through January 20, 1981.

Jurisdictional Section Invoked by the United States

PATCO has now moved to dismiss the Complaint under Fed.R.Civ.P. 12(b)(1) on the theory that Congress has vested exclusive jurisdiction over the conduct complained of in the Federal Labor Relations Authority ("FLRA"). For the United States, on the other hand, the case is one for the straightforward invocation of the grant of jurisdiction under 28 U.S.C. § 1345:

[1]For purposes of this motion to dismiss, the "facts" are of course those alleged in the Complaint. This Court neither makes nor implies any findings as to the truth of the allegations.

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

Thus the question may be simply put as whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101 ff. ("Title VII"), which created the FLRA, is an Act of Congress that "otherwise provide[s]." That question is not as simply answered, for it requires analysis not only of Title VII but of two pre-existing enactments, 5 U.S.C. § 7311 and 18 U.S.C. § 1918.

Title VII and FLRA Jurisdiction

Under 5 U.S.C. § 7116(b):

> (b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—
>
> * * * * * * * * * * *
>
> (7)(A) to call, or participate in, a strike, work stoppage, or slowdown . . . or
> (B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity. . . .

That statutory language is tracked almost verbatim by the Complaint, which alleges that each of the entities comprising PATCO "organized, directed, and commenced a strike against the operations of the air traffic control system and the movement of air traffic within the district and throughout substantial areas of the United States" (¶10), that "This strike has taken the form of a concerted slowdown and a concerted obstruction to the movement of aircraft in air commerce or air transportation" (¶12) and that "PATCO has failed to take any action to prevent or to stop the illegal actions of its members at O'Hare" (¶14).

There is therefore no question that the Complaint charges an unfair labor practice under Title VII. Indeed, two days preceding the filing of this action FAA filed a charge with the FLRA, complaining against PATCO of the same actions alleged in the Complaint in virtually identical language, charging that such conduct is a violation of 5 U.S.C. § 7116(b)(7)(A) and (B) and concluding:

> Because such illegal activity is continuing or expected to continue and because such illegal activity has and will interfere with the ability of the FAA to carry out its essential functions, we request the General Counsel, FLRA, seek appropriate temporary relief (including a restraining order) under 5 U.S.C. 7123(d).

Accordingly FLRA jurisdiction over the controversy between the United States and PATCO is uncontroverted.[2]

Purpose and History of Title VII

Title VII has created a structure and procedure for the investigation and prosecution of unfair labor practices in the federal sector, including its own provisions for judicial review of FLRA's decisions in a Court of Appeals, not a District Court (5 U.S.C. § 7123(b)). It specifically empowers FLRA to petition a *District Court* for necessary temporary relief (including a TRO) upon issuance of an unfair labor practice complaint (5 U.S.C. § 7123(d)).

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[2]In footnote 18 to its brief in this action the United States advises that, "Consistent with the argument that proceedings, if any, before the FLRA are legally irrelevant to the disposition of the defendants' motion," FAA has chosen to seek to withdraw its unfair labor practice charge before the FLRA without prejudice. That decision is itself "legally irrelevant" to the present motion. This Court's subject matter *jurisdiction* cannot be conferred by such a choice, just as it could not be defeated by a choice to institute FLRA proceedings if jurisdiction here exists. We are dealing with the effect of Title VII itself, not with the effect of its having been invoked by one of the parties.

Those provisions embrace the only role given the federal courts under the statute, substantially (and deliberately, as will be discussed below) paralleling the structure of the National Labor Relations Act applicable to the private sector.

As for the question of intended exclusivity, initial scrutiny of the statute itself discloses the following role for FLRA (5 U.S.C. § 7105(a)(1), emphasis added):

> [FLRA] shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, *except as otherwise provided,* shall be responsible for carrying out the purpose of this chapter.[3]

Section 7101(b) defines "the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and need of the Government." It mandates that the provisions "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." And like the counterpart NLRB, Section 7105(a)(2)(G) empowers FLRA to "conduct hearings and resolve complaints of unfair labor practices under section 7118."

Before the enactment of Title VII, federal sector labor-management relations were governed by Executive Order 11491, as amended (the successor to Executive Order 10988). That Order provided for an exclusively administrative process, with the Federal Labor Relations

[3]With two statutes thus containing "except as otherwise provided" clauses, we seem to have an analytical problem reminiscent of the *renvoi* concept in conflict of laws cases.

Council having limited review of decisions regarding alleged unfair labor practice complaints (decided initially by the Assistant Secretary of Labor for Labor-Management Relations). There was no place for the federal judiciary in the structure or procedure for dealing with claimed unfair labor practices in federal employment. *Stevens v. Carey*, 483 F.2d 188, 191 (7th Cir. 1973).

Congress enacted Title VII to establish a statutory base in place of the dependency on Executive Orders. As stated in the reprinted Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong. 1st Sess. (Comm. Print No. 96-7) (hereinafter "Legis. Hist." at 684:

> Title VII of the bill establishes a statutory basis for labor-management relations in the Federal service. Since 1962, Executive Orders have governed the collective bargaining relationship in the Federal sector. Title VII would for the first time enact into law the rights and obligations of the parties to this relationship – employees, agencies, and labor organizations.
>
> Title VII, in concert with the President's Reorganization Plan No. 2 of 1978, also constructs a new framework for the conduct of Federal labor-management relations. The Federal Labor Relations Authority, an independent establishment in the executive branch, together with its Office of General Counsel, will be primarily responsible for the administration

> of the program and the enforcement of the policies reflected in Title VII.

FLRA was intentionally cast in the mold of the NLRB (id. at 687):

> Section 7104, in concert with Reorganization Plan No. 2 of 1978, establishes and describes the Federal Labor Relations Authority, an independent establishment in the executive branch. The committee intends that the Authority's role in Federal sector labor-management relations be analogous to that of the National Labor Relations Board in the private sector. Functions which, under the Executive Order 11491 program, were distributed among various entities (such as the Civil Service Commission and the Department of Labor) are to be consolidated under the Authority.

One of the features of the NLRA most desired by Congress to be imported into federal sector employment relationships was that of defined judicial review in the Courts of Appeal. As stated by Congressman William Ford (Legis. Hist. 856):[4]

> One of the central elements of a fair labor relations program is effective impartial administration. Title VII provides for the creation of an independent and neutral Federal labor relations authority to administer the Federal labor-management program and subjects the decisions of the authority to judicial review.

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[4]Cong. Ford was one of the bill's floor managers and a co-sponsor, on whose statements (quoted later in this opinion) the United States relies to support its position.

> By providing for judicial review of the authority's decisions, similar to that provided under the National Labor Relations Act, the right of both sides to receive an impartial decision is further strengthened, while making the authority more accountable for its actions. Judicial review is one of the primary benefits of a statutory program over an Executive order, and to limit such review also limits the advantages of codification.

As already stated, federal *District Courts* were given no jurisdiction under Title VII except for the limited power to grant temporary relief (including injunctive relief) on the petition of FLRA after issuance of an unfair labor practice complaint by its General Counsel, 5 U.S.C. § 7123(b) and (d).

Exclusivity of jurisdiction is an established hallmark of the NLRB, after which FLRA is tailored. As stated in *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 264-65, 60 S.Ct. 561, 563, 84 L.Ed. 738 (1940) (emphasis added):

> To attain its object Congress created a particular agency, the National Labor Relations Board, and established a special procedure. The aim, character and scope of that special procedure are determinative of the question now before us. Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective. *Congress has entrusted to the Board exclusively the prosecution of the proceeding by its*

> *own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief.* The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

In the same way, the "role and function" of FLRA's General Counsel were specified to "be analogous" to those of NLRB's General Counsel (Legis. Hist. 688). That analogy was underscored in the area of unfair labor practices (Legis. Hist. 766):

> It is intended that unfair labor practice complaints will be handled by the General Counsel of the Authority in a manner essentially identical to National Labor Relations Board practices in the private sector.

As the Supreme Court characterized NLRB's General Counsel in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39, 95 S.Ct. 1504, 1510-11, 44 L.Ed.2d 29 (1975) (emphasis added):

> Congress has delegated to the Office of General Counsel "acting for the Board" the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. Section 153(d); *Vaca v. Sipes*, 386 U.S. 171, 182 [87 S.Ct. 903, 912, 17 L.Ed.2d 842]. In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical ef-

> fect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

There is no designated role for the Department of Justice, as contrasted with the General Counsel, in protecting the public interest when that interest is threatened by action that constitutes an unfair labor practice under the National Labor Relations Act (applicable to private sector employment). Title VII has similarly carved out no specific role for the Department of Justice in protecting the public interest against like threats in the federal employment sector. If that power exists, it must be found to have survived elsewhere despite the comprehensive scheme reflected by adoption of Title VII.

To put the matter in a slightly different way, it is plain beyond cavil that the NLRB, after which Congress specifically modeled FLRA, has *exclusive* jurisdiction over conduct that assertedly constitutes an unfair labor practice. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 248, 79 S.Ct. 773, 781, 3 L.Ed.2d 775 (1959); *Amalgamated Ass'n of Street Electrical Ry. & Motor Coach Employees v. Lockridge,* 403 U.S. 274, 292, 91 S.Ct. 1909, 1920, 29 L.Ed.2d 473 (1971) (applying that rule even though the complaint was not framed in unfair labor practice terms). Were FAA a *private* employer it could not come to this Court for injunctive relief and bypass the NLRB. We turn then to the question whether its status as a federal employer destroys the parallel and permits FLRA to be thus by passed.

Case Law Under Title VII

We do not write on an entirely clean slate with respect to the relationship between FLRA and the federal courts. In two 1980 cases District Courts have held subject matter jurisdiction *absent* in suits seeking injunctive and other relief on behalf of federal employees against conduct that the Courts held would also constitute an unfair labor practice. *National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute,* 493 F.Supp. 675 (N.D.Cal. 1980), *Clark v. Mark, Secretary of the Air Force,* No. 79-CV-777 (N.D. N.Y. August 27, 1980).

In each of those cases the Court engaged in a persuasive analysis, more extended than the prior portion of this opinion, and concluded that FLRA was vested with *exclusive* jurisdiction to deal with conduct that constituted an unfair labor practice. In each case the Department of Justice, which argues to the contrary here, successfully urged that the Court was without subject matter jurisdiction.[5]

As perhaps the capstone to its argument in the other two cases, adopted in each instance by the District Court in reaching its decision, the Department of Justice argued (*National Federation* Br. 8, 9):

> The Supreme Court has held on numerous occasions that where, as here, Congress has provided statutory review procedures designed to permit agency expertise to be applied to particular problems, those procedures must be considered exclusive. *Whitney Bank v. New Orleans Bank,* 379 U.S. 411, 421 [85 S.Ct. 551, 558, 13 L.Ed.2d

[5]Indeed, the Department of Justice brief in *National Federation,* which PATCO attached as an exhibit to its memorandum to this Court, might well have been written as PATCO's brief in *this* case.

> 386] (1964); *Callanan Road Improvements Co. v. United States,* 345 U.S. 507 [73 S.Ct. 803, 97 L.Ed. 1206] (1953); *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 [58 S.Ct. 459, 82 L.Ed. 638] (1938) . . . . That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different result where it has rejected provision for district court review and instead enacted a specific statutory scheme for obtaining judicial review. *Whitney Bank v. New Orleans, supra,* 379 U.S. at 422 [85 S.Ct. at 558]. Exhaustion of the statutorily prescribed procedure is a prerequisite to judicial review. *Id., Montgomery v. Rumsfeld,* 572 F.2d 250 (9th Cir. 1978).

Adopting that argument, the Court in *National Federation* stated (493 F.Supp. at 678):

> If the statutory procedures are designed to permit agency expertise to be applied to particular problems, and if district court jurisdiction would decrease the effectiveness of the statutory design, then such statutory procedures should be considered exclusive. *Whitney National Bank v. Bank of New Orleans & Trust Co.,* 379 U.S. 411, 420-21 [85 S.Ct. 551, 557-58, 13 L.Ed.2d 386] (1965); *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41 [58 S.Ct. 459, 82 L.Ed. 638] (1938). Congress need not expressly label the statutory procedures as exclusive. *Whitney National Bank, supra,* 379 U.S. at 422 [85 S.Ct. at 558].

After reviewing the statutory purpose of Title VII (particularly 5 U.S.C. §§ 7101 and 7105(a)(1), quoted earlier in this opinion), the Court continued (493 F.Supp. at 679):

> In view of the comprehensive scope of the FLRA's duty and authority over labor management relations in the federal government, it would be inconsistent for the district court to assume jurisdiction over subject matter entrusted to the expertise of the agency.

This conclusion in turn underscores the parallel to the NLRA and decisions under it. As the Supreme Court stated in *Amalgamated Clothing Workers of America, et al. v. Richman Bros. Co.*, 348 U.S. 511, 516-17, 75 S.Ct. 452, 455-56, 99 L.Ed. 600 (1955), employing language that readily paraphrases to Title VII and FLRA (emphasis added to the same language the Department of Justice underscored in its *National Federation* brief):

> Congress has provided an administrative agency to pass on claims that rights granted by the Act are denied or that restrictions imposed by the Act are disregarded. Only after the Board has found such claims to be well-founded and has formulated remedies for their vindication does the jurisdiction for their vindication does the jurisdiction for review by the Court of Appeals come into being. However, injunctive relief or a temporary restraining order may be obtained by the Board from the appropriate District Court, pending final adjudication by the Board "upon issuance of a complaint" by the Board or when there is "reasonable cause to believe" in the truth of a charge that a party "has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of Section 8(b)." *Congress explicitly gave such jurisdiction to the district courts only on behalf of the Board* on a petition by it or "the officer or regional attorney to whom

> the matter may be referred." § 10(j), (1), 61 Stat. 149, 29 U.S.C. § 160(j), (1). *To hold that the Taft-Hartley Act also authorizes a private litigant to secure interim relief would be to ignore the closely circumscribed jurisdiction given to the District Court and to generalize where Congress has chosen to specify.* To find exclusive authority for relief vested in the Board and not in private parties accords with other aspects of the Act. See *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 [60 S.Ct. 561, 84 L.Ed. 738]. Such was the authority recognized in *Capital Service, Inc. v. Labor Board,* 347 U.S. 501 [74 S.Ct. 699, 98 L.Ed. 887]. *Id.*

All that remains, then, is to consider the possible impact of 5 U.S.C. § 7311 and 18 U.S.C. §§ 2 and 1918.

Effect of Other Statutes On FLRA Exclusivity

Congress has also dealt specifically with the right — or more accurately the lack of right — of federal employees to strike against the government. Although the United States in its brief characterizes the statute as a "prohibition against strikes in the public sector," 5 U.S.C. § 7311 does not literally speak in those terms, but rather in terms of one of the *conditions* of public employment:

> An individual may not accept or hold a position in the Government of the United States or the Government of the District of Columbia if he—
>
> * * * * *
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States or the

> government of the District of Columbia; or
>
> (4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia.

Section 7311 must however be considered in conjunction with 18 U.S.C. § 1918, which makes an individual's violation of its provisions a crime, and 18 U.S.C. § 2(a), which subjects anyone aiding and abetting commission of a federal crime to punishment as a criminal principal. Thus the specific *statutory* consequence of an *individual employee's* strike participation is his or her potential *termination of employment* under Section 7311 and potential *prosecution* under 18 U.S.C. § 1918. As for a *labor organization,* in *statutory* terms its exposure is to potential *prosecution under* 18 U.S.C. § 2(a).

On three occasions *before* enactment of Title VII, District Courts have exercised their jurisdiction under 28 U.S.C. § 1345[6] to enjoin strikes by fedeal sector employees and labor unions (one of those cases granting such relief against PATCO itself). *Air Transport Ass'n v. PATCO,* 313 F.Supp. 181 (E.D.N.Y. 1970), aff'd in part and rev'd in part on other grounds *sub nom., United*

[6]At that time, of course, there was clearly no Act of Congress that "otherwise provided." Accordingly, because the plaintiff in each case was the United States or a federal agency, Section 1345 jurisdiction unquestionably existed.

States v. PATCO, 438 F.2d 79 (2d Cir. 1970), *cert. denied,* 402 U.S. 915, 91 S.Ct. 1373, 28 L.Ed.2d 661 (1971); *United States v. Branch 60, National Ass'n of Letter Carriers,* 312 F.Supp. 619, 621 (D.Conn. 1970); *TVA v. Local 110, Sheet Metal Workers' International Ass'n,* 233 F.Supp, 997, 1000 (W.D.K.Y.) 1962). In each instance the Court predicated relief on 5 U.S.C. § 7311 and the criminal provisions of 18 U.S.C.[7]

Against that total background, we return to the legislative history under Title VII to examine its references to 5 U.S.C. § 7311. When proposed Title VII (having been introduced in both Houses of Congress in May 1978) was reported out of the respective Senate and House committees, it included a provision making it an unfair labor practice for a labor organization to call, condone or engage in a strike. On the House floor, Representative Erlenborn sought to strike Title VII from the proposed Civil Service Reform Act because of his concern that federal employee strikes would become *only* unfair labor practices rather than remaining illegal as they were under existing law (124 Cong. Rec. H. 9454 (daily ed. Sept. 11, 1978)):

> . . . Under the current law and the Executive Order a strike by federal employees is illegal. The provision here in Title VII instead makes it merely an unfair labor practice.
>
> * * * * *
>
> What I was pointing out is that at the present time it is illegal, not just an unfair labor practice, an illegal strike by Federal employees supported

[7]None of the decisions appeared to give any consideration to the general equitable doctrine that injunctive relief will not be granted against the commission of a crime.

> by their union will lead to the union no longer being allowed to be the exclusive bargaining agent. Now that will be changed, in substance, by this Title VII.

In response, co-sponsor and floor manager Representative William Ford stated that the existing invalidity of federal employee strikes (*id.* at 9455):

> is not affected by this law at all, or by this bill, rather, so the act of striking will continue to be a violation of Federal law. The difference is that this bill for the first time will add on top of that a specific procedure available to the Government to go after a labor organization which advocates strike activity by making that an unfair labor practice reachable in the same way that any other unfair labor practice committed by the union or its representatives is reached by the statute, so that, in fact, we did not affect the existing law on strikes. We add a remedy for the Government in the case of someone advocating an illegal strike, ...

That statement led to the following colloquy (*id.*):

> Mr. Erlenborn. Mr. Chairman, let me understand this. Is the gentleman suggesting that this bill, being a later enactment, would not be considered to be a repeal of the current law, and is it the gentleman's understanding that besides being an unfair labor practice, an illegal strike will also leal to a decertification of the union or to the union's no longer being able to act as the exclusive bargaining agent of the employees?
>
> Mr. Ford of Michigan. If the gentleman will yield further, Mr. Chairman, title 18 of the United States Code 1918 provides criminal penalties against strikes in viola-

tion of 5 United States Code. Five United States Code prohibits the strike. Title 18 makes participating in the illegal strike a crime.

Neither of those titles is affected by any of the provisions in this act.

Immediately thereafter the House rejected the Erlenborn amendment. During the next few days Title VII was amended to, in the words of the amendment's sponsor Representative Rudd, "re-state in clear and unequivocal language that strikes against the Federal government are illegal and punishable" (*id.* at 9640).

Accordingly there is no doubt whatever that 5 U.S.C. § 7311 and 18 U.S.C. § 1918 and § (a) were left totally intact by the enactment of Title VII. It is absolutely clear that a federal employee who strikes still forfeits his or her right to employment under Section 7311 and may be prosecuted under 18 U.S.C. § 1918. It is equally clear that a labor union that participates in such a strike may still be prosecuted as well under 18 U.S.C. § 2(a). In that important sense the strike is truly illegal: It is a *criminal* ofense.

But this Court is not being asked to determine criminal responsibility. It is rather being asked to *enjoin* the conduct of a labor union that is an alleged unfair labor practice. And there is a major difference between the undoubted intention of Congress to preserve the *statutory* provisions making strikes by federal employees illegal and the claimed intention of Congress, advanced by the United States here, to preserve the case law enjoining unions from participating in federal employee strikes.

None of the legislative history adduced by the United States deals with the latter contention in specific terms. On the contrary, Representative Ford's response that led to the rejection of Representative Erlenborn's amendment

was *specifically* framed in terms of the *criminal* penalties and that "participating in the illegal strike [was] a crime." Representative Rudd supported his amendment, accepted by the bill's sponsors, on the ground that "strikes against the Federal government are *illegal* and *punishable*."

Stripped of rhetoric, the position of the United States is that Title VII ousts federal courts of jurisdiction over all unfair labor practices[8] except federal employee strikes. There is nothing in the statute that specifies such a distinction. Indeed, the present case exemplifies the very reason that Congress created the FLRA administrative structure to apply specialized knowledge in the labor relations area. PATCO has asserted in its Second Amended Counterclaim that the claimed "slowdown," challenged as a "strike" in the Complaint, is really and adherence by the air trafic controllers to safety procedures that FAA has established[9] but has then allegedly caused the controllers to disregard or violate. Resolution of those competing contentions of the parties, and thereby determining whether or not an unfair labor practice exists, is an issue that especially lends itself to be, as *National Federation* put it (493 F.Supp. 675 (N.D.Cal. 1980)), "entrusted to the expertise of the agency."

CONCLUSION

This Court finds eminently persuasive the arguments made by the Department of Justice, and ap-

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[8]This was, it will be remembered, the proposition it urged successfully in *National Federation* and *Clark v. Mark*.

[9]Those procedures, allegedly promulgated under the authority of 49 U.S.C. §§ 1348 and 1421, are collected in an Air Traffic Control Handbook, FAA Order 7110.65 B (1980).

proved by the Courts, in *National Federation* and *Clark v. Mark*. It is not persuaded by the Department of Justice's efforts to distinguish those arguments by singling out one and only one kind of claimed unfair labor practice as surviving Title VII and remaining within the jurisdiction of the District Courts for injunctive relief. Title VII is an Act of Congress that "otherwise provide[s]," and this action is dismissed for want of jurisdiction over the subject matter under 28 U.S.C. § 1345.

In view of this ruling, the parties are directed to appear in court for a status report December 29, 1980 at 9:15 a.m. to discuss the status of PATCO's counterclaim, other pending motions, the previously scheduled January 19, 1981 hearing date and other pending aspects of this litigation.[10]

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[10]After this opinion had been dictated, Air Transport Association of America and a number of its members moved to intervene as defendants on PATCO's Second Amended Counterclaim, and this Court entered and continued that motion pending its prompt attention to disposition of the United States" motion to dismiss that Counterclaim. This Court anticipates doing so prior to the December 29 status date.

APPENDIX C

504 F.Supp. 441

UNITED STATES of America, Plaintiff,

v.

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION (PATCO) et al., Defendants.

No 80 C 4390.

United States District Court,
N.D. Illinois, E.D.

Dec. 19, 1980.

Thomas P. Sullivan, U.S. Atty., Frederick H. Branding, Linda A. Wawzenski, Asst. U.S. Attys., Chicago, Ill., for plaintiff.

Gary Ethan Klein, Richard J. Leighton, Leighton, Conklin, Lemov & Jacobs, Washington, D.C., Harvey Nathan, Chicago, Ill., for defendants.

MEMORANDUM OPINION AND ORDER

SHADUR, District Judge.

This Court's December 15, 1980 memorandum opinion and order dismissed this action for want of jurisdiction over the subject matter under 28 U.S.C. § 1345, based on the impact of Title VII of the Civil Service Reform Act of 1978 and its creation of the Federal Labor Relations Authority ("FLRA"). Because Title VII provides for FLRA jurisdiction of unfair labor practice claims against

labor organizations like PATCO, but not in specific terms against its agents, the parties have asked for clarification as to whether the action remains viable as against individual defendants John M. Paolino ("Paolino"), Richard L. Scholz ("Scholz") and Thomas Brockett ("Brockett"). This Court holds that it does not.

Each of the individual defendants is made a party because of his relationship to PATCO: Paolino as PATCO's national vice-president for the Great Lakes Region, Scholz as president of PATCO O'Hare, and Brockett as vice-president of PATCO O'Hara. It would plainly be disruptive of the orderly procedures contemplated by FLRA if its exclusive jurisdiction over unfair labor practices, reflecting a congressional decision that such matters be "entrusted to the expertise of the agency" (*National Federation, etc. v. Commandant, Defense, etc.*, D.C., 493 F.Supp. 675 at 679), could be subverted by a contemporaneous District Court proceeding dealing with the identical issues in the framework of an injunction action.

Moreover, there is the important consideration adverted to in footnote 7 of the December 15 opinion, the general equitable doctrine that injunctive relief will not be granted against the commission of a crime. In that respect, our own Court of Appeals has provided compelling authority in the related area of private sector employment. In *United States v. Jalas*, 409 F.2d 358, 360 (7th Cir. 1969), the Court of Appeals dealt with the government's suit to enjoin violation of a section of the Labor-Management Reporting and Disclosure Act:

> Underlying our examination of the injunctive-relief issue is the doctrine that courts have no power to enjoin the commission of a crime. *See* 5 J. Moore, Federal Practice ¶ 38.24[3], at 192 (2d ed. 1968).

After stating the three historical exceptions to this doctrine (none of which is applicable here), the Court of Appeals affirmed the judgment of the District Court dismissing the action on the ground that the Government had no standing (basically a jurisdictional determination).

Accordingly, this Court confirms that the intended effect of its December 15 memorandum opinion and order was to dismiss the Complaint against the individual defendants as well as PATCO for want of jurisdiction, so that the Complaint and the action itself are dismissed in their entirety.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-2854

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION (PATCO); PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, O'HARE LOCAL #315 (PATCO O'HARE); THE OFFICERS, AGENTS, DIRECTORS, MANAGERS, SERVANTS AND MEMBERS OF BOTH PATCO AND PATCO O'HARE; JOHN M. PAOLINO, RICHARD L. SCHOLZ, TOM BROCKETT, JOHN DOE AND RICHARD ROE,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 80-C-4930, Milton I. Shadur, Judge.

Argued February 25, 1981 — Decided June 18, 1981

Before SWYGERT and BAUER, Circuit Judges, and CRABB, District Judge.*

*The Honorable Barbara B. Crabb, United States District Judge for the Western District of Wisconsin, is sitting by designation.

SWYGERT, Circuit Judge. The issues presented in this case are (1) whether Title VII of the Civil Service Reform Act, 5 U.S.C. §§ 7101-35, covering federal labor-management relations, preempts the jurisdiction of district courts under 5 U.S.C. § 7311, which prohibits strikes by employees of the Government of the United States, and (2) if there is no preemption, whether strike activity by such employees can be enjoined under section 7311. We hold that there is no preemption and that injunctions under section 7311 are within the jurisdiction of the federal courts. Accordingly, we reverse the order of the district court dismissing the action for lack of jurisdiction.

I

On July 30, 1980, Richard L. Scholz, the president of Professional Air Traffic Controllers Organization, O'Hare Local No. 316, (PATCO) wrote the Federal Aviation Administration (FAA), demanding that the FAA take immediate action to upgrade the O'Hare Tower to a Level 5 facility[1] and provide a tax-free bonus of $7,500.00 to each controller. Scholz stated that the two demands were non-negotiable and gave the FAA ten days in which to grant the demands or prove that they would be implemented. Scholz threatened that

> Failure to meet these two demands will result in the controllers at O'Hare ATCT (Air Traffic Control Tower) withdrawing their enthusiasm.

Upon receipt of union demands on August 5, 1980, the Regional Administrator asked for two weeks to respond and reminded PATCO of its statutory obligation not to

[1] Air Traffic Control Towers throughout the nation are categorized on a scale of 1 to 4 based on the quantity and complexity of traffic handled. No tower bears a Level 5 designation nor does such a designation exist for control towers.

strike. He also stated that the FAA considered Scholz's letter a threat of an illegal job action.

A slowdown of traffic at O'Hare Airport began August 6. It culminated on Friday, August 15, 1980, when more than six hundred commercial and private planess in and around O'Hare experienced delays of more than thirty minutes during a 21-hour period from 12:01 a.m. to 9:00 p.m. inclusive.[2]

The intensified slowdown on August 15 paralyzed airport traffic. On Sunday, August 17, 1980, the United States petitioned the district court *ex parte* for a temporary restraining order; later that day, Judge Nicholas J. Bua, acting as an emergency judge, entered a temporary restraining order enjoining the "slowdown." On August 18, the United States instituted this action against the local union, its parent, and the officers and agents of both organizations, seeking a preliminary injunction. Expedited discovery was prusued by the parties. On October 20, 1980, the defendants filed a motion to dismiss the suit against them for lack of subject matter jurisdiction. On December 15, 1980, the district court granted the motion, basing its dismissal on three grounds: (1) Title VII of the Civil Service Reform Act of 1978 vests exclusive jurisdiction over strike activities by federal employees in the Federal Labor Relations Authority; (2) 5 U.S.C. § 7311 does not authorize injunctive relief; and (3) injunctive relief will not be granted against the commission of a crime. This appeal followed.[3]

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[2]Some of these delays lasted as long as three hours. Numerous planes were diverted to other airports and many flights were cancelled.

[3]On June 9, 1981, the Government filed a motion for an expedited ruling, alleging that defendants have threatened to strike on June 22, 1981. The Government requests a decision in strike on June 22, 1981. The Government requests a decision in this case on or before June 19, 1981. This motion is rendered moot by our opinion filed today.

II

A. Pre-Title VII Law

Prior to the enactment of Title VII of the Civil Service Reform Act of 1978, federal labor-management relations were regulated by Executive Order 11491, as amended.[4] Section 19(b)(4) of the order made it an unfair labor practice for a labor organization to "call or engage in a strike, work stoppage, or slowdown . . . or condone any such activity by failing to take affirmative action to prevent or stop it." Section 4(c)(4) of the Executive Order authorized the Federal Labor Relations Authority to decide unfair labor practice complaints.

The courts that considered the scope of the district court's jurisdiction over actions to enforce the Executive Order held that there was no subject matteer jurisdiction because an executive order was not a law of the United States within the meaning of 28 U.S.C. § 1331. *See Stevens v. Carey,* 483 F.2d 188, 190 (7th Cir. 1973); *Kuhn v. National Ass'n of Letter Carriers,* 570 F.2d 757, 760-61 (8th Cir. 1978); *Local 1948, American Federal of Government Employees v. American Federation of Government Employees,* 522 F.2d 486, 491 (3d Cir. 1975).[5] District courts did, however, enjoin strikes by federal employees,

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[4]Exec. Order 11491, 3 C.F.R. 861 (1966-1970 Compilation), *as amended* by Exec. Order 11616, 3 C.F.R. 605 (1971-1975 Compilation); Exec. Order 11636, 3 C.F.R. 634 (1971-1975 Compilation); Exec. Order 11838, 3 C.F.R. 957 (1971-1975 Compilation); Exec. Order 11901, 3 C.F.R. 87 (1976- Compilation); Exec. Order 12027, 3 C.F.R. 159 (1977- Compilation); Exec. Order 12107, 44 Fed. Reg. 1055 (1979); Exec. Order 12126, 44 Fed. Reg. 18923 (1979).

[5]District courts did have jurisdiction under the Executive Order in cases involving allegations that the federal agency violated constitutional rights. *See National Association of Government Employees v. White,* 418 F.2d 1126, 1129-30 (D.C. Cir. 1969).

invoking the general grant of jurisdiction in 28 U.S.C. § 1345[6] to enforce the anti-strike provision of 5 U.S.C. § 7311 and 18 U.S.C. § 1918.[7] *Air Transport Ass'n v. PATCO,* 313 F. Supp. 181 (E.D.N.Y.), *rev'd in part on other grounds,* 438 F.2d 79 (2d Cir. 1970), *cert. denied,* 402 U.S. 915 (1971); *United States v. Branch 60, National Ass'n of Letter Carriers,* 312 F. Supp. 619 (D. Conn. 1970); *Tennessee Valley Authority v. Local 110, Sheet Metal Workers' Int'l Ass'n,* 233 F. Supp. 997 (W.D. Ky. 1962). The district courts in those cases did not discuss the jurisdictional question, rather, they assumed that they had jurisdiction to enjoin strikes by federal employees.

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[6] *28 U.S.C.* § 1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

[7] U.S.C. § 7311 provides in part:

> An individual may not accept or hold a position in the Government of the United States . . . if he—
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States . . .; or
>
> (4) is a member of an organization of employees of the Government of the United States . . . that he knows, asserts the right to strike against the Government of the United States . . . .

18 U.S.C. § 1918 contains criminal penalties for the violation of prohibitions of 5 U.S.C. § 7311:

> Whoever violates the provision of section 7311 of title 5 . . . shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

B. Purpose and Structure of Title VII

Title VII of the Civil Service Reform Act of 1978 was enacted to provide a comprehensive statutory scheme for the regulation of federal labor-management relations. The statute created a new, independent agency, the Federal Labor Relations Authority (FLRA), 5 U.S.C. § 7104 (Supp. III 1979), which was to be primarily responsible for carrying out the purposes of Title VII, 5 U.S.C. § 7105(a)(1) (Supp. III 1979). Congress adopted almost verbatim the language of section 19(b)(4) of the Executive Order, making it an unfair labor practice for a union to call, participate, or condone a strike or slowdown. 5 U.S.C. § 7116(b)(7) (Supp. III 1979).

The statute set out administrative procedures to enforce the unfair labor practice provisions. Section 7118(a) provides that upon receipt of an unfair labor practice charge, the General Counsel of the FLRA shall investigate the charge and then decide whether or not to issue a complaint.[8] After a hearing on the complaint and the issuance of written findings of fact, the FLRA is authorized to issue a cease and desist order against any unfair labor practice. 5 U.S.C. § 7118(a)(7) (Supp. III 1979). Section 7123 provides for judicial review of final orders of the FLRA by the federal court of appeals, and for enforcement of FLRA orders by the district courts.

The statute also authorizes the FLRA to petition a district court for temporary relief, including a temporary

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[8]According to the Report of the House Committee on Post Office and Civil Service, H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 52 (1978), *reprinted in* Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess. 698 (1979) (Comm. Print. No. 96-7) [hereinafter cited as Leg. Hist.], "[t]he General Counsel's decision as to whether a complaint should issue shall not be subject to review."

restraining order, only after the General Counsel has issued an unfair labor practice complaint. 5 U.S.C. § 7123(d) (Supp. III 1979). According to the district court, these provisions for judicial review, enforcement of FLRA orders, and issuance of temporary relief by a district court upon motion of the FLRA "embrace the only role given the federal courts under the statute." *United States v. PATCO,* No. 80-C-4390, mem. op. at 5 (N.D. Ill. Dec. 15, 1980).

C. Legislative History

We note initially that, in interpreting the legislative history of a statute, there is a presumption that Congress was aware of the judicial construction of existing law. *Shapiro v. United States,* 335 U.S. 1, 16 (1948). Thus, a newly-enacted statute "is to be read in conjunction with the entire existing body of law." *Kansas City v. Federal Pacific Electric Co.,* 310 F.2d 271, 275 (8th Cir.), *cert. denied,* 371 U.S. 912 (1962).

We recognized previously that the administrative jurisdiction provided by Executive Order 11491, coexisted with federal court jurisdiction, which was invoked pursuant to 28 U.S.C. § 1345 to enforce the prohibition of 5 U.S.C. § 7311 and 18 U.S.C. § 1918; as noted at pp. 5-6, *supra,* districts courts exercised this jurisdiction to enjoin strikes. When Congress enacted Title VII, it adopted the language of section 19(b)(4) of the Executive Order in section 7116(b)(7), making it an unfair labor practice for a union "to call, or participate in, a strike, work stoppage, or slowdown." Because we presume that Congress knew of the district court jurisdiction invoked concurrently with the administrative provisions of the Executive Order, we must conclude that when Congress codified without

this provision of the Executive Order, it did not intend to preempt the existing concurrent jurisdiction of the federal courts.

We find additional support for our conclusion in both the language of the statute itself and the congressional debates prior to its enactment. Section 7101(b) of the Civil Service Reform Act of 1978 provides that "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government." Before the FLRA can seek temporary relief in a district court it must (1) have an unfair labor practice charge pending before it; (2) investigate that charge; (3) make a finding of probable cause; and (4) issue an unfair labor practice complaint. 5 U.S.C. §§ 7118(a), 7123(d). While the Government is waiting for the FLRA to follow this procedure, the employees could be out on strike. Such a result is not consistent with the goal of an "effective and efficient Government." The reason for Congress's prohibition of strikes by federal employees was reiterated during the congressional debates on Title VII:

> The primary reason for Government services is to supply the public with certain essentials of life which cannot reasonably be supplied by the average citizen himself, or to him by private enterprise . . . . Because those services are essential to the health, welfare and safety of the public, . . . it becomes intolerable that they be interrupted.

124 Cong. Rec. H. 9651 (daily ed. Sept. 13, 1978) (remarks of Rep. Rousselot), *reprinted in* Leg. Hist., *supra,* at 959. *See also* 125 Cong. Rec. H 9868 (daily ed. Sept. 13, 1978) (remarks of Rep. Rudd) ("Some of these services are so critical that their disruption threatens the public well-being"), *reprinted in* Leg. Hist., supra, at 964.

The question of preemption was raised by Representative Erlenborn during the congressional debates. The following colloquy took place:

> Mr. Erlenborn: . . . [A]t the present time it is illegal not just an unfair labor practice, an illegal strike by Federal employees, supported by their union will lead to the union no longer being allowed to be the exclusive bargaining agent. Now that will be changed, in substance, by this title VII.
>
> Mr. Glickman: . . . [P]articipating in or calling an illegal strike, being in violation of any other Federal laws, or perhaps other criminal laws — or does this section supersede anything like that? What I am trying to figure out, does this apply only to an unfair strike, or do other applications of the Federal law still prohibit the strike?
>
> Mr. Erlenborn: So far as I know this will be the only remedy, the unfair labor practice charge . . .
>
> Mr. Ford: . . . That statute is not affected by this law at all, or by this bill, rather, so the act of striking will continue to be a violation of Federal law.
>
> The difference is that this bill for the first time will add on top of that a specific procedure available to the Government to go after a labor organization which advocates strike activity by making that an unfair labor practice reachable in the same way that any other unfair labor practice committed by the union or its representatives is reached by the statute, so that, in fact, we did not affect the existing law on strikes. We add a

> remedy for the Government in the case of some advocating an illegal strike . . .
>
> Mr. Erlenborn: Mr. Chairman, let me understand this. Is the gentleman suggesting that this bill, being a later enactment, would not be considered to be a repeal of the current law? . . .
>
> Mr. Ford: . . . [T]itle 18 of the United States Code 1918 provides criminal penalties against strikes in violation of 5 United States Code. Five United States Code prohibits the strike, Title 18 makes participating in the illegal strike a crime.
>
> *Neither of those titles is affected by any of the provisions in this act.*

124 Cong. Rec. H. 9454-55 (daily ed. Sept. 11, 1978), *reprinted in* Leg. Hist., *supra,* at 880-81 (emphasis added). These statements make it clear that Congress in enacting Title VII did not intend to preempt existing remedies for strikes by federal employees.

D. Analogy to the NLRA

The district court relied on an analogy to the National Labor Relations Act (NLRA) to support its holding that the FLRA had exclusive jurisdiction over this case. The district court recognized that Congress intended the authority of the FLRA to parallel that of the NLRB. *Se* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 41 (1978), *reprinted in* Leg. Hist., *supra,* at 687.

Although we agree with the statement that Congress intended the role of the FLRA to parallel the NLRB in many respects, Congress nevertheless recognized that there are important differences between labor relations in the private and public sectors, and that these differences com-

pel different treatment of these two groups. First, Congress's exemption of federal employees from the NLRA and enactment of Title VII indicate that Congress intended private and public employees to be treated differently under the law. The legislators discussed the necessity for different treatment during the debate over Title VII. *See* 124 Cong. Rec. S. 14281 (daily ed. Aug. 24, 1978) (remarks of Sen. Sasser) ("the Federal labor relations program continues to differ in substantial ways from that of the private sector. For one, Federal employees are not allowed to strike."), *reprinted in* Leg. Hist., *supra,* at 1014; 124 Cong., Rec. H. 8466 (daily ed. Aug. 11, 1978) (remarks of Rep. Clay) ("there are nevertheless differences between the public and the private sector"), *reprinted in* Leg. Hist., *supra,* at 853, 124 Cong. Rec. H. 9640 (daily ed. Sept. 13, 1978) (remarks of Rep. Rudd) ("It has long been recognized that public employment is quite different than private sector employment. These differences are most acute when it comes to labor relations in general, and strikes in particular."), *reprinted in* Leg. Hist., *supra,* at 938. These statements by the legislators support our conclusion that the analogy to the NLRB is only partial.

The district court's analysis of the parallel to the NLRB is further undercut by a provision in the National Labor Relations Act that authorizes a district court to enjoin a strike upon a petition from the Attorney General when the strike "will imperil the national health or safety."[9] Con-

[9] 29 U.S.C. § 178(a) provides:

> Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing

gress recognized that in certain critical situations, districts courts must have jurisdiction to enjoin actual or threatened strikes. A similar statutory provision was not necessary in Title VII because district courts had already held that they had jurisdiction to enjoin strikes under 28 U.S.C. § 1345. *See* pp. 5-6, *supra.*

E. Post-Title VII Cases

Two courts have considered the scope of the district court's jurisdiction under Title VII, and both courts held that FLRA jurisdiction over unfair labor practices is exclusive. *Clark v. Mark,* No. 79-CV-777 (N.D.N.Y. Aug. 27, 1980); *National Federal of Federal Employees v. Commandant, Defense Language Institute,* 493 F. Supp. 675 (N.D. Cal. 1980). Those cases are, however, distinguishable from the case at bar.

Both district court cases concerned activities that are unfair labor practices only; the work slowdown involved in the instant case is not only an unfair labor practice but is also prohibited by a separate statute, 5 U.S.C. § 7311. Thus, the conclusion that the FLRA has exclusive jurisdiction over unfair labor-practices is irrelevant to own holding that the district court has jurisdiction under 28 U.S.C. § 1345 to enforce the prohibition of 5 U.S.C. § 7311.

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thereof, and if the court finds that such threatened or actual strike or lock-out –

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

Finally, as a matter of policy the United States must have the option to seek immediate injunctive relief from the district court to avoid the emergency that a paralyzing strike at O'Hare Airport would likely create. The magnitude of harm to our national economy and to the security of air travelers that a strike might cause are valid reasons for the United States to avoid, if it chooses, seeking temporary relief through the FLRA procedures. Those procedures could be both lengthy and abortive. First, an investigation must be undertaken; upon its completion, the General Counsel must decide whether to issue a complaint against the offending party. Once these steps have been completed, the General Counsel may seek a temporary restraining order in the district court. His decision about whether to go to court is not only unilateral, but, of greater importance, is unreviewable. *See* n.8, *supra*. An intentional slowdown or strike by air traffic controllers at O'Hare Airport is too fraught with dire consequences to the public to confine the United States to the procedures as set out in the FLRA. Policy consideration dictate that the Government be able to consider whether more prompt relief can be afforded by an alternative procedure.

III

The district judge observed that although the Government characterizes section 7311 as a prohibition against strikes by its employees, the statute "does not literally speak in those terms, but rather in terms of one of the conditions of public employment." The judge went on to comment:

> Section 7311 must however be considered in conjunction with 18 U.S.C. § 1918, which makes an individual's violation of its provisions a crime, and 18 U.S.C. § 2(a), which subjects anyone

> aiding and abetting commission of a federal crime to punishment as a criminal principal. Thus the specific statutory consequence of an individual employee's strike participation is his or her potential termination of employment under Section 7311 and potential prosecution under 18 U.S.C. § 1918. As for a labor organization, in statutory terms its exposure is to potential prosecution under 18 U.S.C. § 2(a).[10]

This passage suggests that the district court viewed the criminal penalties of 18 U.S.C. § 1918 and the penalty of termination implicit in the terms of 5 U.S.C. § 7311 as the exclusive remedies for engaging in the prohibited conduct. We disagree with that conclusion.

"It is a familiar maxim of statutory interpretation that courts should enforce a statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation." *Haberman v. Finch,* 418 F.2d 664, 666 (2d Cir. 1969). *See also Logan Lanes, Inc. v. Brunswick Corp.,* 378 F.2d 212, 216 (9th Cir.), *cert. denied,* 389 U.S. 898 (1967). As noted previously, the purpose of the prohibition of 5 U.S.C. § 7311 and 18 U.S.C. § 1918 was to prevent the interruption of critical Government services. *See* p. 9, *supra.*

In the case at bar, dismissing or indicting all the air traffic controllers involved in the slowdown would not be a viable remedy for the Government. First, terminating a substantial number of controllers would seriously impair the FAA's ability to provide the public with this essential

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[10] 18 U.S.C. § 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

service; this is precisely the sort of result that the statutory provisions were intended to prevent. Second, indicting or terminating the controllers after a strike or slowdown does nothing to prevent the strike and the serious consequences that would surely follow. Thus, the only remedy available to the Government that can prevent a strike is an injunction.

Further, a new statutory remedy is not exclusive, and common-law rights and remedies survive, unless Congress intended the new remedy to be exclusive. *Continental Management, Inc. v. United States,* 527 F.2d 613 (Ct. Cl. 1975). *See also Federal Marine Terminals, Inc. v. Burnside Shipping Co.,* 394 U.S. 404, 412 (1969) ("the legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect"). At common law, public employees had no right to strike, *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879, 882 (D.D.C.), *aff'd,* 404 U.S. 802 (1971), and the Government had the right to seek injunctive relief in the federal courts, *see United States v. United Mine Workers,* 330 U.S. 258, 278-80 (1947). Nothing in the language of either 5 U.S.C. § 7311 or 18 U.S.C. § 1918 indicates that Congress intended the penalties in those provisions to be the only remedies available to the Government in the case of an actual or threatened strike by public employees. Because in the absence of indications to the contrary, we presume that Congress did not intend the statutory remedies to be exclusive, and because an injunctive remedy is necessary to effectuate the purpose of those provisions, we conclude that an injunction is an available remedy under section 7311.

That the defendants seek to enjoin PATCO, the union organization, poses no obstacle to injunctive relief under

section 7311. While the union cannot be dismissed as an employee can, of course, the union speaks for the individual employees and acts for them as its bargaining agent. Under ordinary principles of agency law, the union may therefore be enjoined as the agent of its employees, and it is a proper party-defendant.

IV

At the request of the parties, the district judge clarified his disposition of the case as to the individual defendants in a second opinion dated December 19, 1980. In that opinion, the court discussed the general equitable principle that an injunction will not be granted against the commission of a crime, and cited *United States v. Jalas,* 409 F.2d 358, 360 (7th Cir. 1969).

In *Jalas,* the United States sought to enjoin Clarence Jalas from being a candidate for the office of business manager of his local union because of his prior conviction under section 186(b)(1) of the Landrum-Griffin Act, 29 U.S.C. § 186(b)(1). He had received common stock from an employer while serving as his local's busines manager, and his conviction for such conduct allegedly disqualified him under 29 U.S.C. § 504(a) as a candidate for union office.[11] We held that the Government lacked standing to bring this suit. Our opinion concluded:

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[11]Section 504(a) provides in part:

> . . . has been convicted of . . . bribery . . . shall serve—
>
> (1) as an officer, director . . . business agent . . . .

Section 504(b) provides that

> Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

> Because the case law and statutory language do not compel a contrary conclusion, we hold that the Government has no standing to bring this injunctive action. There is no national emergency which warrants departing from the general rule prohibiting injunctions against the commission of criminal acts. If we were to hold otherwise and enjoin Jalas from holding office, we would necessarily be deciding in the context of a civil action *an important criminal law question* under section 504(a) (emphasis added).

That affirmative acts or omissions to act proscribed by a civil statute are also subject to criminal sanctions does not *ipso facto* convert the civil proscription into criminal activity. Conduct described as illegal can simultaneously be subject to both civil remedies and criminal sanctions. If statutory provisions permit, the Government may pursue either or both avenues for enforcement of the proscribed conduct to effectuate an overriding public policy. *See National Ass'n of Letter Carriers v. Independent Postal System,* 470 F.2d 265, 271 (10th Cir. 1972). To the point is our observation is *United States v. Capetto,* 502 F.2d 1351, 1357 (7th Cir. 1974):

> It has thus been settled since the *Debs* decision [158 U.S. 564 (1895)] that acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts also are punishable as crimes.

As in *Jalas,* this case involves a statute that combined civil and criminal provisions. Section 7311 constituted on-

ly one-half of Pub. L. 330, 84th Cong., 1st Sess., and that the other half is now incorporated in the Code at 18 U.S.C. § 1918. The difference in emphasis between *Jalas* and this case, however, is significant.[12] In *Jalas* the impeding commission of a crime was the sole basis for the injunctive relief sought. Here, as in *Cappetto*, the injunction is necessary to prevent the potential civil consequences of the prohited conduct. The principles enunciated in *Jalas* are therefore not a bar to the issuance of an injunction in this case.

For the reasons stated herein, the order of the district court dismissing the action is reversed and the cause is remanded for further proceedings.

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[12]We recognized also in *Jalas* three exceptions to the general rule that courts have no power to enjoin the commission of a crime. 400 F.2d at 360. Only one of those exceptions is applicable here: an "acute national emergency." Even though we find it unnecessary to address the issue directly, we are of the view that had it been fully addressed by the district court, the facts surrounding the slowdown would have warranted the court to have found that a threatened strike or even a continuation of the deberate slowdown would have created acute and national emergency consequences.

CRABB, *Chief District Judge, concurring.* I concur fully in Judge Swygert's well-reasoned opinion. I write separately only to emphasize what I consider to be a particularly troublesome issue in this case.

Critical to the court's decision is the construction of 5 U.S.C. § 7311: specifically, whether § 7311 can be read, with 28 U.S.C. § 1345, to authorize federal court unjunctive relief against strikes or slowdowns by federal employees. By its language, § 7311 states a condition of employment, *i.e.*, that an individual "may not accept or hold a position in the Government of the United States" if he participates in a strike, asserts the right to strike, or is a member of an organization that asserts the right to strike. The statute is silent with respect to any rights the government might have against an individual employee or an organization of employees asserting a right to strike, except for such rights of removal from, or denial or, employment as can be inferred from the terms of the statute.

Notwithstanding this silence, other federal courts have construed the statute in conjunction with the criminal penalties provided in 18 U.S.C. § 1918 and § 2, and have enjoined strikes by federal employees.[1] *Air Transport Ass'n. v. PATCO,* 313 F. Supp. 181 (E.D.N.Y. 1970), *reversed in part on other grounds,* 438 F.2d 79 (2nd Cir. 1970), *cert. denied, 402 U.S. 915* (1971); *United States v. Branch 60, National Ass'n, of Letter Carriers,* 312 F. Supp. 619 (D. Conn. 1970); *Tennessee Valley Authority v. Local 110, Sheet Metal Workers' International Ass'n.,* 233 F. Supp. 997 (W.D. Ky. 1962). In the absence of any

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[1]The general equitable doctrine that injunctive relief will not be granted against the commission of a crime suggests that the injuctive relief was ordered pursuant to 5 U.S.C. § 7311.

statutory authority other than that provided by § 7311, I have some doubt as to whether a jurisdictional basis existed for these district court injunctions.[2]

However, I believe the question of jurisdiction has been made moot by Congress' implicit approval of the exercise of such jurisdiction concomitant to the enactment of Title VII of the Civil Service Reform Act of 1978. The legislative history of Title VII indicates that Congress understood that the then existing statutes provided that strikes of federal employees were illegal and punishable. Implicit in this understanding was a recognition that district courts had enjoined strikes by federal employees and, *ipso facto,* had the requisite authority to enjoin the strike. *See* 124 Cong. Rec. H 9454-55 (daily ed. Sept. 11, 1978), *reprinted in* Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess. 698 (1979) (Comm. Print No. 96-7) [hereafter cited as Leg. Hist.] (colloquy between Reps. Erlenborn, Glickman, and Ford). Most importantly, the legislative history indicates that Congress did not intend to alter either the then existing prohibitions against strikes, or the then existing sanctions, including injunctions, prohibiting strikes:

> [The existing prohibition against federal employees striking is] not affected by this law at all, or by this bill; rather, so the act of striking will continue to be a violation of Federal law.
>
> The difference is that this bill for the first time *will add on top of that* a specific procedure available to the Government to go after a labor

[2]None of the courts in the cases cited above addressed the issue of subject matter jurisdiction.

> organization which advocates strike activity by making that an unfair labor practice reachable in the same way that any other unfair labor practice committed by the union or its representative is reached by the statute, so that, in fact, we did not affect the existing law on strikes. *We add a remedy* for the Government in the case of someone advocating an illegal strike, . . .

124 Cong. Rec. H 9455 (daily ed. Sept. 11, 1978) (remarks of Rep. Ford), *reprinted in* Leg. Hist., *supra,* at 880-81 (emphasis added).

Accordingly because Congress intended to ratify pre-existing sanctions against strikes by federal employees in enacting Title VII, and because those pre-existing sanctions included injunctions against strikes by federal employees, I join in the court's conclusion that injunctions under 5 U.S.C. § 7311 are within the jurisdiction of the federal courts. I do so cognizant of the countervailing arguments so thoroughly discussed in the district court's opinion. Indeed, the strength of the parties' competing arguments underscores my own belief that this is an instance in which the statutory framework and legislative history provide federal courts with little, if any, guidance. Strikes by federal employees raise any number of important policy questions. Resolution of such questions should result from a full and complete inquiry by Congress, rather than by judicial construction from a shadowy statutory framework.

APPENDIX E

Opinion by Judge Swygert
Judge Crabb concurring

JUDGMENT – ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOS 60604

June 18, 1981

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. BARBARA B. CRABB, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 80-2854 vs.

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, (PATCO), et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 80-C-4930
MILTON I. SHADUR, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said

District Court in this cause appealed from be, and the same is hereby **REVERSED**, with costs, and **REMANDED**, in accordance with the opinion of this Court filed this date.

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*Honorable Barbara B. Crabb, Judge, United States District Court for the Western District of Wisconsin, sitting by designation.

APPENDIX F

NORTHERN DISTRICT OF NEW YORK

WILLIAM J. CLARK, PASQUALE F. DENIGRO, THOMAS GRAZIANO, AUGUST L. MAGNANTI, ORRIE PASSANTE, JR., AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2612, 79-CV-777

Plaintiff,

v.

HANS MARK, SECRETARY OF THE AIR FORCE

Defendant.

APPEARANCES:

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ELIZABETH MEDAGLIA ESQ.
ELIZABETH T. GUARINO, ESQ.

NEAL P. McCURN, D.J.

MEMORANDUM DECISION AND ORDER

I. Introduction

This case concerns a dispute between the Secretary of the Department of the Air Force, Hans Mark (defendant), and plaintiffs, Local 2612 of the American Federation of Government Employees and five civilian employees of the Air Force who are current members of Local 2612 at Griffiss Air Force Base (Griffiss)[1] in Rome, New York. (Plaintiffs are hereafter referred to as "plaintiffs", "plaintiff union members", or "plaintiff union" where appropriate.)

The dispute arose when the Air Force notified plaintiff union that it was required to repay the Air Force $2,884.00 which the Air Force had mistakenly withheld from the pay of thirty-seven (37) civilian employees and paid to plaintiff union as union dues between 1973 and 1978.[2] These employees were plaintiff union members at Griffiss who had left the bargaining unit at various dates and who continued as union members, but were ineligible for an automatic withholding of their union dues upon separation from the unit. After plaintiff union failed to reimburse the Air Force, it was notified that the amount claim-

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[1]Griffiss Air Force Base is not a named party in this suit. Defendant does, however, exercise complete authority over the administrative and personnel actions undertaken by the Department of the Air Force at the air base.

[2]The union dues allotment permission form is entitled "Request and Authorization for Voluntary Allotment of Compensation for Payment of Employees Organization Dues." The language on this form demonstrates that the burden is on plaintiff union member if that person wants to revoke authorization for the dues allotment.

ed due would be set off against union dues withheld from the pay of present members of plaintiff union, including the five individual plaintiff union members.[3]

Article 35 of the Collective Bargaining Agreement between Griffiss and plaintiff union provided for union dues withholding.[4] Title VII of the Civil Service Reform Act

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[3]On July 27, 1979, Captain G. H. Harrison, a member of the U.S. Air Force at Griffiss, sent a letter to plaintiff union. It states, in pertinent part:

> A thorough review of the financial records of employees listed on the attached sheet has disclosed that for various periods of time they held non-unit positions in which they were not entitled to exercise the union dues "check off" option. Nevertheless, dues "checkoff' " was erroneously processed from their pay.
>
> The Air Force is required to recoup these dues from your organization and return them to the employees unless the employee personally waives such recoupment and reimbursement. This recoupment shall be for the last six years as of the date of this letter.

[4]The Collective Bargaining Agreement between plaintiff union and Griffiss Air Force personnel was entered into on August 20, 1976 The dues withholding agreement, Article 35, provides, in pertinent part:

> Local 2612, American Federation of Government Employees has been granted exclusive recognition at Griffiss Air Force Base, and is therefore eligible to enter into a written agreement that permits voluntary allotments from pay for dues of its eligible employee members . . . .An eligible employee member of Local 2612, AFGE has the right to make voluntary allotment from his pay for the payment of his membership dues or to revoke his allotment whenever he so desires. . . .The Union will supply the SF-1187, "Request and Authorization for Voluntary Allotment of Compensation for Payment of Employee Organization Dues", certify on the form the amount of its dues, and distribute it to eligible employees who want to authorize an allotment. . . .Eligible employees return the

of 1978, 5 U.S.C. § 7101, *et seq.* (Title VII is hereafter referred to as the Federal Labor Relations Statute, or "FLRS") became effective on January 11, 1979. As of that date plaintiff union's entitlement to a dues withholding was also provided for by statute. See U.S.C. § 7115.

On November 30, 1979, plaintiffs brought this action against defendant seeking a temporary restraining order, preliminary and permanent injunction, writ of mandamus, and declaratory judgment to prevent defendant from recouping any money from the current members' dues. Plaintiffs' complaint alleges that the jurisdiction of this Court "is based on 28 U.S.C. § 1331(a) in that this is an action arising under the First and Fifth Amendments of the Constitution and the laws of the United States – 5 U.S.C. § 701 and 7101 *et seq.*" Complaint at 2. In the complaint plaintiffs assert that "[d]efendant's actions to recoup money on behalf of former union members' dues

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SF-1187 to the Union after completing [it]. . . .The Union submits the completed and certified SF-1187 to the. . . servicing civilian payroll office. . .[which] will prepare a listing of names and amounts withheld and forward it together with the remittance check. The list [prepared by the Air Force] will also include the names of those employees for whom allotments have been permanently or temporarily stopped . . . An allotment is terminated when the employee leaves the unit as a result of resignation, retirement, transfer, or other separation, ressignment, promotion. . .or other personal action. . . .The Union will promptly notify the servicing civilian payroll office, in writing, when one of its members is suspended or expelled or ceases to be a member in good standing. . . .An employee can voluntarily revoke his allotment. . .at any time by submitting written notification. . .to the servicing civilian payroll office. . . .The labor organization will be responsible for informing and educating its members concerning the voluntary program for the allotment of dues, the uses and availability of SF-1187, and the conditions for revocation of allotments.

allotments is without any authority in law and is a wrongful conversion without due process of law under the Fifth Amendment." Complaint at 25. Further, plaintiffs state that "[b]y seeking to recoup money on behalf of former union members from dues allotments for the sole purpose of payment of their union dues, defendant is endangering and infringing upon plaintiffs' membership status in violation of the First Amendment Right of Freedom of Association and [the FLRS]." Complaint at 26. In their memorandum of law plaintiffs assert that defendant's proposed recoupment violates the union dues assignment agreement (Article 35 of the Collective Bargaining Agreement). They allege that if the proposed recoupment of erroneously withheld dues takes place, plaintiff union members and other union members will not have their dues paid in full and will possibly lose their union membership and benefits. Complaint at 22-25

After the complaint and motion for a temporary restraining order were filed, plaintiffs and defendant entered into an agreement preserving the status quo and preventing the proposed recoupment until this Court rules on the plaintiffs' motion for a preliminary injunction. Thereafter, defendant filed a motion to dismiss on grounds that the complaint fails to state a claim upon which relief can be granted and lack of subject matter jurisdiction. On January 10, 1980, this Court held a hearing on plaintiffs' motion for a preliminary injunction during which defendant presented a jurisdictional challenge. After taking evidence and hearing argument, the Court reserved decision and allowed the parties to submit further

papers with respect to defendant's motion to dismiss.[5] These proceedings were consolidated into a hearing on the merits. Rule 65, Fed. R. Civ. P.

On January 24, 1980, pursuant to Rule 24, Fed. R. Civ. P., the Federal Labor Relations Authority (hereinafter referred to as FLRA) moved to intervene for the purpose of asserting its exclusive jurisdiction over disputes relating to alleged violation of the FLRS. 5 U.S.C. § 7101, *et seq.* The FLRA, asserted that it has a right to intervene because it has sole responsibility under 5 U.S.C. § 7105(a)(2)(G) to determine plaintiffs' claims of violations of the FLRS and that action by this Court on this issue would usurp its authority. In the alternative, the FLRA asserted that allowing intervention here would be a proper exercise of

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[5] At the hearing testimony and documents were received by this Court which describe the union dues check-off system in operation at Griffiss between plaintiff union and defendant. Article 35 of the Collective Bargaining Agreement places responsibility on both defendant and plaintiffs for withdrawal of the dues allotment permission form SF-1187, when a union member leaves the bargaining unit. The Griffiss civilian payroll office is required to notify the union when an allotment is terminated when an employee leaves the bargaining unit as a result of resignation, retirement, transfer, or other separation, reassignment, promotion, or other personal action. The union must notify when one of its members is suspended, expelled or ceases to be a member in good standing. The plaintiff union bears an additional responsibility for informing and educating its members concerning the dues allotment program and the conditions for the revocation of allotments. See footnote 4, supra.

It appears that errors were made by both plaintiff union and defendant concerning the withdrawal of permission for dues allotments previously filed by each of the thirty-seven (37) employees when they submitted their SF-1187 forms. Although substantial errors were made by defendant's civilian payroll office at Griffiss in failing to report when an employee left the bargaining unit, the union failed in its responsibility to educate its members concerning the dues check-off system. Adequately prepared union members who had dues erroneously withheld could have initiated timely corrective section.

this Court's discretion because the FLRA is charged with administration of the FLRS. On February 25, 1980, after hearing oral argument the Court granted the motion to intervene from the Bench.

Presently before this Court are:

(1) plaintiffs' motion for a preliminary and permanent injunction, mandamus and declaratory judgment;

(2) defendant's motion to dismiss; and

(3) FLRA's motion to dismiss the claims in the complaint which are based on alleged violations of the FLRS.

Defendant Secretary's motion to dismiss is based on alleged exclusive jurisdiction of the FLRA and upon the failure of plaintiff to demonstrate a minimum probable irreparable injury, a necessary requisite for preliminary injunctive relief.

The intervenor FLRA's motion to dismiss under Rule 12(b)(1), Fed. R. Civ. P., is similarly based on its alleged exclusive jurisdiction over the subject matter of this suit. The FLRA argues that plaintiffs' allegations constitute unfair labor practices under the FLRS for which it has exclusive jurisdiction and that plaintiffs at the time of argument had not filed an unfair labor practice claim with it[6]

In opposition to defendant's and intervenor's motion to dismiss, plaintiffs argue that their complaint is based essentially on violations of the First and Fifth Amendments and not solely on violations of the Collective Bargaining Agreement and the FLRS. Plaintiffs assert

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[6]On May 22, 1980, plaintiff union filed an unfair labor practice charge with the FLRA. The charge seeks relief from the FLRA for precisely the same actions by defendant which are the subject matter of this lawsuit.

that the unfair labor practice provision, 5 U.S.C. § 7116, is not an exclusive remedy here, but merely a secondary alternative remedy. They argue that the FLRA cannot decide the Constitutional issues which are the heart of their claims in this case. Further, they assert that this Court's jurisdiction over their constitutional claims is not pre-empted by that of the FLRA even though they have not exhausted FLRA administrative remedies. Plaintiffs allege that defendant has no authority to order the recoupment of money in contradiction to the Article 35 allotment provisions. They frame the issue of this case as whether the defendant has a right to unilaterally take and use an employee's dues assignment monies for an unauthorized purpose.

II. **Discussion.**

A. Claims Under the FLRS.

Plaintiffs' complaint and submitted memoranda clearly demonstrate that their allegations are covered, at least in part, by the FLRS. In the Complaint plaintiffs allege that "this is an action arising under . . . the laws of the United States – 5 U.S.C. § 7101, et seq."; that "[u]nder . . . 5 U.S.C. § 7115, an allotment is terminated when the employee leaves the bargaining unit"; that "[t]he plain duty of Griffiss Air Force Base under the collective bargaining contract it has entered into with plaintiff AFGE Local 2612, now being administered in accordance with 5 U.S.C. § 7115, is to transmit to the union the full amount of dues deducted from the pay of union members"; and "[p]laintiffs request that the Court enter a declaratory judgment that defendant's recoupment actions are in violation of plaintiffs' . . . statutory rights under 5 U.S.C. § ____ 7101 et seq . . . ."

The statute relied upon, in part, by plaintiffs as a basis for asserting this Court's jurisdiction, 5 U.S.C. § 7115, provides:

> a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment . . .
>
> b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when –
>
> 1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; . . .

5 U.S.C. § 7116 provides:

> a) For the purpose of this chapter, it shall be an unfair labor practice for an agency – . . .
>
> 8) to otherwise fail to refuse to comply with any provision of this chapter.

Under § 7116(a)(8), any agency violation of § 7115 is an unfair labor practice. Under 5 U.S.C. § 7118, any allegation of unfair labor practice is required to be filed with the General Counsel of the FLRA for investigation and the issuance [copy illegible] receives an unfair labor practice are

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[5] 5 U.S.C. § 7118 provides:

> a)(i)f any agency or labor organization is charged by any person with having engaged in an unfair labor practice, the

set forth at 45 Fed. Reg. 3505-3510. These include procedures for the investigation of charges; determination as to whether to issue a complaint; the issuance of a complaint; conduct of a hearing; the duties of an administrative law judge; and, for making a final determination on the complaint.

It is clear that plaintiffs' cause of action, as premised upon claimed violations of the FLRS, should have been brought before the FLRA as an unfair labor practice complaint instead of this Court. Claims concerning a dispute over the recoupment of erroneously withheld dues clearly come within the purview of 5 U.S.C. § 7115 and § 7116. They are within the exclusive jurisdiction of the FLRA to hear. 5 U.S.C. § 7105 provides, in pertinent part:

> a)(1) The Authority [FLRA] shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.
>
> (2) The Authority [FLRA] shall, to the extent provided by this chapter . . .
>
> (G)conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title . . .

General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint. . . .

Thus, under this section and 5 U.S.C. § 7104(f)(2), the FLRA and its General Counsel are vested with the responsibility for investigating and prosecuting unfair labor practice complaints.

The formal procedural steps which must be followed when any party files an unfair labor practice charge are set out in 5 U.S.C. § 7118. When an unfair labor practice charge is filed with the FLRA, its General Counsel must conduct an investigation and dismiss the charge or issue a complaint. 5 U.S.C. [copy illegible] § violations of the FLRS. The July 31, 1978, Report of the House Committee on Post Office and Civil Service discusses the intended role of the FLRA and the purpose of the FLRS:

> Title VII [of the FLRS], in concert with the President's Reorganization Plan No. 2 of 1978, also constructs a new framework for the conduct

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[8]In *Eisman v. Pan American World Airlines,* 336 F.Supp. 543 (E.D. Pa. 1971) the court found that private plaintiffs were precluded under the Federal Aviation Act from seeking an injunction for an alleged violation of that Act. In the *Eisman* decision, the court approvingly quoted from *Caribbean Atlantic Airlines, Inc. v. Leeward Islands Air Transport,* 269 F.Supp. 231, 233 (D. P.R. 1967). There, the court, in denying injunctive relief, stated:

> The plain language of Section 1487(a) precludes a private litigant from resort to the jurisdiction of a United States district court for the purpose of prosecutnig a civil action to enforce the provisions of 49 U.S.C.A. § 1372(a), since the statute provides that only the CAB or the Administrator may apply to the district court for the enforcement of any provision of this chapter, or any rule, regulation, requirement or order thereunder.

See also, Rauch v. United Instruments, Inc., 405 F.Supp. 435, 440-441 (E.D. Pa. 1975).

> of Federal-labor-management relations. The [FLRA], an independent establishment in the establishment, together with its Office of General Counsel, will be primarily responsible for the administration of the program and enforcement of the policies reflected in Title VII . . . . Section 7104, in concert with Reorganization Plan No. 2 of 1978, establishes and describes the [FLRA], an independent establishment in the executive branch. The committee intends that the Authority's role in Federal sector-labor-management relations be analogous to that of the National Labor Relations Board in the private sector. Functions which, under the Executive Order 11491 program, were distributed among various entities (such as the Civil Service Commission and the Department of Labor) are to be consolidated under the Authority.

Report of the Committee on Post Office and Civil Service of H.R. 11280, H.R. Rep. No. 95-1403, 9th Cong., 2d Sess. 38, 41 (July 31, 1978).

The Senate also anticipated that the role of the Federal Labor Relations Authority (FLRA) would be analogous to that of the National Labor Relations Board (NLRB). The Senate Governmental Affairs Committee's Comments referred to unfair labor practice charges:

> It is intended that unfair labor practice complaints will be handled by the General Counsel of th Authority in a manner essentially identical to National Labor Relations Board practices in the private sector.

Report of the Committee on Governmental Affairs on S. 2640, S. Rep. No. 95-969, 95th Cong., 2d Sess. 106, reprinted in 1978 U.S. Code Cong. & Ad. News 2723, 2828.[9]

In analogizing the role of the FLRA and the scope of judicial review of its actions under the Federal Labor Relations Statute (FLRS) to the role of the NLRB and the scope of judicial review under the National Labor Relations Act (NLRA), Congress recognized judicial acceptance of the NLRB's exclusive jurisdiction over the administration and adjudication of unfair labor practice charges. In discussing the role of the NLRB and its exclusive jurisdiction over the administration and adjudication of unfair labor practice charges, the Supreme Court has stated:

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[9]The role of the NLRB's General Counsel is similar to the role of the FLRA's General Counsel. In, *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-139 (1975), the Supreme Court described authority of the NLRB's General Counsel:

> Congress has delegated to the Office of General Counsel on "behalf of the Board" the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. § 153(d); *Vaca v. Sipes*, 386 U.S. 171, 183 (1967). In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

> The Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the [NLRB] was made the exclusive agency for that purpose. . . .
>
> The Act then sets forth a definite and restricted course of procedure. A charge of an unfair labor practice may be made to the [NLRB], but the person or group making the charge does not become the actor in the proceeding. It is the Board, and the Board alone or its designated agent, which has power to issue its complaint against a person charged with an unfair labor practice. . . .
>
> So far, it is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assume protection from the described unfair conduct in order to remove obstructions to interstate commerce.

Amalgamated Utility Workers v. Consolidated Edison Co. of New York, 309 U.S. 261, 264-265 (1940). further, it has been held that federal district courts have no jurisdiction to enter private controversies to enjoin or remedy any alleged violations of the NLRA. *Amalgamated Clothing Workers of America v. Richman Brothers* 348 U.S. 511, 516-517 (1955). See generally *National Labor Relations Board v. Nash-Finch Co.,* 404 U.S. 138, 145 (1971).

The allegations in plaintiff's complaint, as premised upon the FLRS, constitute unfair labor practice charges which should be brought before the FLRA.[10] The statutes and their legislative history demonstrate that Congress did not intend to allow unions, agencies or individuals to petition the district courts for injunctive relief for final determinations concerning unfair labor practice charges. The FLRA and its General Counsel have exclusive jurisdiction over the investigation and prosecution of unfair labor practice charges in the federal sector and have the right to seek preliminary injunctive relief and further judicial review. Inasmuch as the FLRA has exclusive jurisdiction to adjudicate alleged violations of the FLRS, this Court lacks jurisdiction. Plaintiffs' claims are properly before the FLRA.[11]

B. Constitutional Claims.

There remains the consideration of plaintiffs' Constitutional claims. Plaintiffs allege that defendants' proposed recoupment violates their First Amendment right of

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[10]Plaintiff argued at the hearing for the preliminary injunction that 5 U.S.C. § 7112 did not apply in this case. They asserted that the recoupment errors which were made affected past union members who were promoted out of the bargaining unit to supervisory positions and that § 7112 does not pertain to supervisors. However, plaintiffs' allegations are in fact unfair labor practice complaints which are covered under the FLRA.

[11]The Court notes that the result reached here as to the claims made under the FLRS is consistent with recent decision in *National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute, West Coach Barnch, et al.*, C-79-2952 (N.D. Cal, April 21, 1980).

freedom of association and their Fifth Amendment due process rights. They contend that the allegations made in the complaint are based primarily upon these Constitutional provisions. Defendants assert that these claims are arguably unfair labor practices which are subject to the exclusive jurisdiction of the FLRA.

As discussed previously in this opinion, the role of the FLRA was intended by Congress to be analogous to the NLPA's role in private labor-management relations. It is a question of first impression as to whether pre-emption as applied under the NLRA should be used in a similar manner under the FLRS.

When unfair labor practices are alleged under the NLRA, the general rule is that "the federal courts must defer to the exclusive competence of the [NLRB]." *San Diego Trades Council v. Garmon,* 359 U.S. 236, 248 (1959). See also, Menzines, Stein and Gruff, *Administrative Law* § 2.03[1] (1979). This general rule of exclusive jurisdiction of the NLRB is not limited to situations where there have been specific allegations of unfair labor practices. In *Amalgamated Association of Street Electrical Railway & Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971), the Supreme Court stated:

> Assuredly the proposition that Lockridge's complaint was not subject to the exclusive jurisdiction of the NLRB because if charged a breach of contract rather than an unfair labor practice is not tenable. Pre-emption, as shown above, is designed to shield the system from conflicting regulation of conduct. It is the conduct being regulated, not the formal description of the governing legal standards, that is the proper

> focus of concern. Indeed, the notion that a relevant distinction exists for such purposes between particularized and generalized labor law was explicitly rejected in *Garmon* itself. . . .

Id. at 292. In focusing upon the conduct being regulated here, plaintiffs claim that the proposed recoupment violates their First and Fifth Amendment rights constitutes an arguable unfair labor practice complains under 5 U.S.C. § 7116(a)(8) concerning violations of 5 U.S.C. § 7115. In a case brought under the NLRA, the Supreme Court stated "[W]hen, an activity is arguable subject to . . .§8 of the Act [concerning unfair labor practices], the States as well as the federal courts must defer to the exclusive competence of the [NLRB]. . . .", *San Diego Building Trades Council v. Garmon,* supra, 359 U.S. at 245. Accord, *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 187-188 (1978); *Buckley v. American Federation of Television & Radio Artists,* supra, 496 F.2d at 312-313; *Getz v. Southwestern Bell Telephone,* 465 F.Supp. 883, 886 (E.D. Mo. 1979); *Bernstein v. Universal Pictures, Inc.,* 379 F.Supp. 933, 939 (S.D.N.Y. 1974).

Since plaintiffs' Constitutional claims are arguable unfair labor practices, they must be dismissed as pre-empted under the FLRS. Plaintiffs can bring these claims before the FLRA. This result is dictated by the Second Circuit's decision in an analogous NLRB case. *Buckley v. American Federation of Television & Radio Artists,* supra, 496 F.2d at 312. There, Constitutional claims, which were determined to be unfair labor practices, were dismissed because the federal court was required to defer to the exclusive competence of the NLRB. *Id* at 312. The dismissal here is inconsistent with judicial concern, as demonstrated in

Buckley, that the national labor policy be shielded from conflicting regulation.[12]

C. Preliminary Injunction.

Although dismissing plaintiffs' claims because they should be brought before the FLRA, this Court feels compelled to discuss the issuance of a preliminary injunction here because until the FLRA makes its detemination, defendant is free to begin recouping the monies from plaintiff union members. Keeping this in mind, even if the Court had jurisdiction to issue a preliminary injunction, it would not do so here.

The standard in the Second Circuit for the issuance of a preliminary injunction is that:

> there must be a showing of possible irreparable injury *and* either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair grounds for litigation and a balance of hardships tipping decidedly toward the party requesting the relief. *Buffalo Courier-Express, Inc. v. Buffalo Evening News,* 601 F.2d 48, 54 (2d Cir. 1979), quoting from *Caulfield v. Board of Education of the City of New York,* 583 F.2d 605, 610 (2d Cir. 1978).

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[12]In retrospect, if the Court had not dismissed plaintiffs' Constitutional claims because its jurisdiction is pre-empted by the FLRA, it would have stayed resolution of these claims under the doctrine of primary jurisdiction until after the FLRA had made its determination. In *P.A.M. News Corp. v. Hardin,* 440 F.2d 255 (D.C. Cir. 1971), the court stated that "[c]ourts generally prefer to rule upon Constitutional questions which involve the scope of power of an administrative agency only after the agency itself has considered the Constitutional issue and made a determination about the weights of competing administrative policies and interests." *Id.* at 257.

Irreparable injury means "injury for which a monetary award cannot be adequate compensation [and] where money damages [are] adequate compensation, a preliminary injunction will not issue." *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc,* 596 F.2d 70, 72 (2d Cir. 1979). Furthermore, the threatened injury may not be remote or merely speculative. *State of New York v. Nuclear Regulatory Commission,* 550 F.2d 745 (2d Cir. 1977).

Under this standard, even if this Court had not granted the motion to dismiss, it would not have issued a preliminary injunction here. Although plaintiffs have shown a possible irreparable injury, however slight, because of the possible damage to management-employee relations at Griffiss if the proposed recoupment takes place, neither a probable success on the merits or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly to plaintiffs have been demonstrated.

III. Conclusion

Plaintiffs' motion for preliminary and permanent injunctive relief, for a writ of mandamus and for a declaratory judgment is denied. Intervenor's motion for a dismissal as based upon the FLRS is granted and defendant's motion to dismiss all of the claims is granted.

Plaintiffs are free to bring their claims before the FLRA.

IT IS SO ORDERED.

/s/__
U.S. District Judge

Date: Syracuse, New York
August 27, 1980

Opposition

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No. 81-542

In the Supreme Court of the United States

OCTOBER TERM, 1981

PROFESSIONAL AIR TRAFFIC CONTROLLERS ORGANIZATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the enactment of Title VII of the Civil Service Reform Act of 1978 implicitly divested the federal courts of their authority to enjoin unlawful strikes by federal employees upon application of the United States.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 87a-107a) is reported at 653 F. 2d 1134. The memorandum opinions and orders of the district court (Pet. App. 64a-86a) are reported at 504 F. Supp. 432.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1981 (Pet. App. 108a-109a). The petition for a writ of certiorari was filed on September 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Professional Air Traffic Controllers Organization (PATCO) was the collective bargaining representative of air traffic controllers employed by the Federal Aviation

Administration (FAA).[1] On July 30, 1980, Richard Scholz, the president of PATCO Local 316, at Chicago's O'Hare Field, demanded that the FAA take immediate action to up-grade the O'Hare Tower to a Level 5 facility (a designation that does not exist) and to give a $7500 tax-free bonus to each O'Hare controller (Pet. App. 88a & n.1). Scholz informed the FAA that the two demands were "non-negotiable" and threatened that (*id.* at 88a):

> Failure to meet these two demands will result in the controllers at O'Hare ATCT (Air Traffic Control Tower) withdrawing their enthusiasm.

The FAA did not accede to these demands, and the O'Hare controllers began a slowdown that virtually paralyzed airport traffic by August 15, 1980 (Pet. App. 89a). On August 17, 1980, the United States District Court for the Northern District of Illinois issued a temporary restraining order, on the motion of the United States, prohibiting PATCO, the O'Hare Local, and several individual union officers (all of whom will be referred to as "PATCO"), as well as PATCO's individual members, from continuing any work stoppage or concerted slowdown at O'Hare (*id.* at 65a, 89a). The government based its action on 5 U.S.C. 7311 and analogous criminal statutes prohibiting strikes by federal employees;[2] the jurisdiction of the court was invoked

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[1]On October 22, 1981, the Federal Labor Relations Authority (FLRA) revoked PATCO's exclusive representative status under 5 U.S.C. (Supp. III) 7120(f), based on the fact that PATCO called an unlawful strike, commencing August 3, 1981, in violation of 5 U.S.C. (Supp. III) 7116(b)(7)(A) and (B). On October 27, 1981, the United States Court of Appeals for the District of Columbia Circuit denied petitioners' application to stay the effect of the FLRA's order pending appeal.

[2]The relevant statutory provisions are reproduced in the appendix to the petition (Pet. App. 51a-52a). 5 U.S.C. 7311 provides that "[a]n individual may not accept or hold a position in the Government of the United States * * * if he * * * (3) participates in a strike * * * against the Government of the United States * * *." Violations of this section

under 28 U.S.C. 1345. PATCO subsequently challenged the court's jurisdiction, and the temporary restraining order was continued by agreement pending decision of the jurisdictional issue.

2. On December 15, 1980, the district court dismissed this action on the ground that Congress' enactment of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. III) 7101 *et seq.*, had removed the traditional authority of the federal courts to enjoin unlawful strikes by government employees (Pet. App. 64a-83a). Congress created in Title VII a comprehensive scheme for the regulation of federal labor-management relations and provided a statutory basis for federal agencies to redress unfair labor practices, including strikes (see 5 U.S.C. (Supp. III) 7116(b)), committed by bargaining representatives of federal employees.[3] To carry out the purposes of Title VII, Congress

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may be punished by a fine of up to $1000 and imprisonment for a term not to exceed one year and one day (18 U.S.C. 1918), and 18 U.S.C. 2(a) authorizes the punishment, as a principal, of anyone who "aids, abets, counsels, commands, induces or procures" the commission of an offense against the United States. Injunctions were issued on the basis of these statutes in *Air Transport Association* v. *PATCO*, 313 F. Supp. 181 (E.D.N.Y.), rev'd in part on other grounds, 438 F. 2d 79 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971); *United States* v. *Branch 60 National Association of Letter Carriers*, 312 F. Supp. 619 (D. Conn. 1970); and *TVA* v. *Local 110, Sheet Metal Workers' International Association*, 233 F. Supp. 997 (W.D. Ky. 1962). These statutory provisions also provided the basis for more than 100 injunctions and restraining orders that were issued thoughout the United States following the air traffic controllers' strike of August 3, 1981.

[3]Prior to the enactment of Title VII, striking by federal employees had been made an unfair labor practice by executive orders. See Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969) (as amended), *reprinted in* 5 U.S.C. (Supp. III) 7101 note. However, the courts had generally held that they lacked subject matter jurisdiction over unfair labor practices that were violations only of executive orders. See, *e.g.*, *Kuhn* v. *National Association of Letter Carriers*, 570 F. 2d 757 (8th Cir. 1978); *Local 1948, American Federation of Government Employees* v. *American Federation of Government Employees*, 522 F. 2d 486 (3d Cir. 1975); *Stevens* v. *Carey*, 483 F. 2d 188 (7th Cir. 1973).

also created the Federal Labor Relations Authority (FLRA), an independent agency modeled after the National Labor Relations Board (NLRB). Among other things, the FLRA was authorized, upon issuance of an unfair labor practice complaint, to seek temporary injunctive relief in federal district courts. Title VII does not, in terms, purport to abrogate the right of the United States to obtain anti-strike injunctions based on 5 U.S.C. 7311, but the district court observed (Pet. App. 73a; emphasis in original) that "the NLRB * * * has *exclusive* jurisdiction over conduct that assertedly constitutes an unfair labor practice" in the private sector under *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), and its progeny. The district court concluded, based on the comparable roles assigned to the NLRB and the FLRA, that Congress implicitly intended to limit the government's recourse, in the event of a strike by federal employees, to the filing of an administrative complaint with the FLRA (Pet. App. 68a-73a).

3. The court of appeals reversed (Pet. App. 87a-107a). Relying on this Court's decision in *Shapiro* v. *United States*, 335 U.S. 1 (1948), the court of appeals emphasized (Pet. App. 93a) the "presumption that Congress was aware of the judicial construction of existing law," and noted (*id.* at 94a) that Congress had expressly provided in Title VII that "[t]he provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government" (5 U.S.C. (Supp. III) 7101(b)). The court then examined the legislative history of Title VII, finding clear and convincing evidence that Congress intended the unfair labor practice remedies of Title VII to supplement, rather than supplant, the government's equitable remedies under 5 U.S.C. 7311 (Pet. App. 94a-97a). The court of appeals also recognized that proceedings before the FLRA "could be both lengthy and abortive," and that "as a matter of policy the United States must have the option to seek immediate injunctive relief from the district court to

avoid the emergency that a paralyzing strike at O'Hare Airport would likely create" (*id.* at 99a).

ARGUMENT

The decision below is plainly correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The thrust of petitioners' argument is that Congress intended, when it enacted Title VII, to divest the federal courts of jurisdiction to act, upon application of the United States, to enjoin strikes by public employees in violation of 5 U.S.C. 7311. This argument is without merit, however, because Congress clearly recognized the government's right to seek relief against unlawful strikes directly in the district courts when it enacted Title VII.

As the court of appeals correctly stated (Pet. App. 93a), "there is a presumption that Congress was aware of the judicial construction of existing law. *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948)." On three separate occasions before the enactment of Title VII in 1978, the government obtained injunctions to enforce the anti-strike provisions of 5 U.S.C. 7311 (or its predecessor) by invoking the general jurisdictional grant of 28 U.S.C. 1345.[4] Congress, of course, made no provision in Title VII that would expressly limit or withdraw this remedy, but petitioners would infer such a limitation from what they perceive to be congressional silence about federal remedies other than those created by Title VII. As this Court has observed, however, "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law" (*Girouard* v. *United*

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[4]28 U.S.C. 1345 provides: "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."

States, 328 U.S. 61, 69 (1946)), and even statutes that in general terms "divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." *United States* v. *United Mine Workers*, 330 U.S. 258, 272 (1947) (footnote omitted) (anti-injunction provisions of the Norris-LaGuardia Act do not preempt the government's common law right to enjoin strikes by federal employees).[5] Even if the legislative history were silent on this point, it would therefore be inappropriate to construe Title VII as having displaced the government's pre-existing remedies under Section 7311. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 285 n.13 (1974).

Far from being silent, however, Congress made clear that Title VII was not intended to supplant remedies already available to the government. Title VII codified and gave the force of law to the unfair labor practice standards previously contained in executive orders. See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 38 (1978). However, the scheme established in the executive orders had always coexisted with the government's separate right to seek equitable enforcement of the no-strike laws, and Congress sought to preserve that pattern. During the House debates, Representative Erlenborn argued unsuccessfully against Title VII on the ground that it would have the effect of cutting back the government's remedies "[u]nder the current law" and making a strike by federal employees "merely an unfair labor practice." 124 Cong. Rec. H9454 (daily ed. Sept. 11, 1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at

[5] In *United States* v. *United Mine Workers*, *supra*, the Court referred only to the government's "common law" rights because that decision preceded the enactment of both 5 U.S.C. 7311 and its predecessor provision.

879 (Comm. Print 1979) ("*Leg. Hist.*"). That statement prompted Representative Glickman to inquire whether the new law "supersede[s] * * * other Federal law[s]" prohibiting parties from "participating in or calling an illegal strike." 124 Cong. Rec. H9455 (daily ed. Sept. 11, 1978), *Leg. Hist.* 880. Representative Ford, a floor manager and key proponent of the bill, thereafter laid the question to rest by explaining (124 Cong. Rec. H9455 (daily ed. Sept. 11, 1978), *Leg. Hist.* 881 (emphasis added)):

> Mr. FORD. * * * That statute is not affected by this law at all, or by this bill, rather, so *the act of striking will continue to be a violation of Federal law.*
>
> The difference is that this bill for the first time will add on top of that a specific procedure available to the Government to go after a labor organization which advocates strike activity by making that an unfair labor practice reachable in the same way that any other unfair labor practice committed by the union or its representatives is reached by the statute, so that, in fact, *we did not affect the existing law on strikes. We add a remedy for the Government in the case of someone advocating an illegal strike,* which we think meets the court test of still not violating any first amendment rights.[6]

The point was reiterated during the exchange that followed (124 Cong. Rec. H9455 (daily ed. Sept. 11, 1978), *Leg. Hist.* 881 (emphasis added)):

> Mr. ERLENBORN. Mr. Chairman, let me understand this. Is the gentleman suggesting that this bill, being a later enactment, would not be considered to be a repeal of the current law * * *?

---

[6]See *National Association of Letter Carriers* v. *Blount*, 305 F. Supp. 546 (D.D.C. 1969) (three-judge court), appeal dismissed, 400 U.S. 801 (1970).

> Mr. FORD. * * * Title 18 of the United States Code 1918 provides criminal penalties against strikes in violation of 5 United States Code. Five United States Code prohibits the strike. Title 18 makes participating in the illegal strike a crime.
>
> *Neither of those titles is affected by any of the provisions in this act.*

See also 124 Cong. Rec. H9640 (daily ed. Sept. 13, 1978), *Leg. Hist.* 937-938 (remarks of Rep. Rudd) ("This provision is consistent with the penalties already contained in title 5 of the United States Code. * * * But more importantly, this amendment is consistent with the original and overall intent of this legislation—to facilitate the removal of those [striking] employees.").

The same understanding was evidenced during the Senate debates. Senator Javits explained (124 Cong. Rec. S14314 (daily ed. Aug. 24, 1978), *Leg. Hist.* 1025):

> And you cannot strike against the Federal Government * * *. You may strike illegally, as the postal workers are threatening to do, but that is true of any law. It can be broken and punishment and reaction must follow.

Similarly, Senator Hatch noted (124 Cong. Rec. S14316 (daily ed. Aug. 24, 1978), *Leg. Hist.* 1030 (emphasis added)):

> Since the law says that *a union cannot strike—which is the present law, irrespective of what is being done here* in civil service reform—the union has an obligation not to promote or encourage a strike.[7]

---

[7]There is no basis for petitioners' argument (Pet. 11-13) that the decision below "conflicts in principle" with *Buckley* v. *American Federation of Television and Radio Artists*, 496 F. 2d 305 (2d Cir.), cert. denied, 419 U.S. 1093 (1974). The question involved in that case was whether a constitutional claim that also embodied an allegation of an

Moreover, it is unreasonable to assume that Congress would have intended to limit the government's response to

---

unfair labor practice under the National Labor Relations Act was within the NLRB's exclusive jurisdiction under the *Garmon* doctrine. No variation of the *Garmon* doctrine is relevant here because Congress intended the government's recourse based on 5 U.S.C. 7311 to survive its creation of the FLRA, and because it did not seek in these circumstances to divest the federal courts of jurisdiction under 28 U.S.C. 1345.

Petitioners' attempt to defeat jurisdiction by analogizing to the NLRA and the *Garmon* doctrine is flawed in other respects. Thus, while Congress intended Title VII generally to parallel the NLRA, it recognized important distinctions between the two statutory schemes relating to the unique status of the sovereign as employer. See, *e.g.*, 124 Cong. Rec. S14281 (daily ed. Aug. 24, 1978), *Leg. Hist.* 1014 (remarks of Sen. Sasser) ("[t]he Federal labor relations program continues to differ in substantive ways from that of the private sector. For one, Federal employees are not allowed to strike."); 124 Cong. Rec. H9640 (daily ed. Sept. 13, 1978), *Leg. Hist.* 938 (remarks of Rep. Rudd) ("It has long been recognized that public employment is quite different than private sector employment. These differences are most acute when it comes to labor relations in general, and strikes in particular."); 124 Cong. H9647 (daily ed. Sept. 13, 1978), *Leg. Hist.* 950 (remarks of Rep. Lott) ("I think most of us agree that Federal employee unionism cannot fairly be compared to collective bargaining in the private sector. The Federal Government is not a private corporation responsible to a few stockholders, but a sovereign entity responsible to all taxpayers, unionized or nonunionized."). Title VII manifests these differences, in part, by denying federal labor unions resort to strikes as a bargaining tool, by limiting their power to negotiate wages as a condition of employment (see 5 U.S.C. (Supp. III) 7102(2), 7103(a)(14)(B) and (C)), and by prescribing that Title VII is to be "interpreted in a manner consistent with * * * effective and efficient Government" (5 U.S.C. (Supp. III) 7101(b)).

At all events, petitioners' arguments would fail even if Title VII and the NLRA were in all respects identical. As the court of appeals observed (Pet. App. 97a-98a), the *Garmon* doctrine does not bar anti-strike injunctions in the private sector in circumstances comparable to those presented here. See 29 U.S.C. 178(a)(i) and (ii) (jurisdiction will lie in the district courts to enjoin a strike that "affects an entire industry" or "will imperil the national health or safety"). See also *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970) (Norris-LaGuardia Act does not prohibit injunction enforcing no-strike clause in a collective bargaining agreement).

an unlawful strike to the pursuit of an unfair labor practice remedy. As the court of appeals correctly stated (Pet. App. 99a):

> [A]s a matter of policy the United States must have the option to seek immediate injunctive relief from the district court to avoid the emergency that a paralyzing strike * * * [could] create. The magnitude of harm to our national economy and to the security * * * [of citizens that could attend a strike by employees like air traffic controllers] are valid reasons for the United States to avoid, if it chooses, seeking temporary relief through the FLRA procedures. Those procedures could be both lengthy and abortive. First, an investigation must be undertaken; upon its completion, the General Counsel [of the FLRA] must decide whether to issue a complaint against the offending party. Once these steps have been completed, the General Counsel may seek a temporary restraining order in the district court. His decision about whether to go to court is not only unilateral, but, of greater importance, is unreviewable.

Thus, regardless of whether Congress intended to limit the government's redress to the discretion of the FLRA's General Counsel in dealing with other kinds of unfair labor practices, it certainly did not intend to do so with respect to strikes, which are also proscribed by 5 U.S.C. 7311 and 18 U.S.C. 1918.[8]

2. There is no merit to petitioners' contention (Pet. 7) that this case presents "unsettled" questions of federal labor relations law that are now ripe for plenary consideration by

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[8]There is no basis for petitioners' assertion (Pet. 10-11) that the decision below casts doubt on the scope of exclusive FLRA jurisdiction over unfair labor practices other than strikes. Both the legislative history and the decision below recognize that public employee strikes are *sui generis*.

this Court. In the wake of the recent air traffic controllers strike, the United States sought and obtained temporary restraining orders or preliminary injunctions pursuant to 5 U.S.C. 7311 and 18 U.S.C. 1918 in 85 judicial districts. Not one district court considered petitioners' jurisdictional arguments sufficiently substantial to warrant the denial of injunctive relief. Moreover, with the exception of the appeal pending in the Second Circuit in *Air Transport Association* v. *PATCO*, No. 81-7447 (argued Oct. 19, 1981),[9] we are aware of only three pending appeals arising out of the August 1981 air traffic controllers strike, and two of those (*United States* v. *PATCO Local Nos. 439 et al.*, No. 81-1992 (10th Cir.), and *United States* v. *Haggerty*, Nos. 81-2024 & 81-2058 (10th Cir.)) do not even raise the jurisdictional argument advanced in this petition.[10]

---

[9]In that case, petitioners sought relief from a permanent injunction under Fed. R. Civ. P. 60(b)(5), based on jurisdictional arguments similar to those advanced here. See Pet. 5 n.3. Although the district court there expressed agreement with the government's view that Title VII was not intended to divest the federal courts of their authority to enjoin federal employee strikes, the district court held that PATCO could not satisfy the equitable standard of Rule 60(b)(5), even assuming the correctness of its jurisdictional argument, and thus denied relief without expressly ruling on that issue. At all events, we note that the FLRA, in its brief amicus curiae in that case, has agreed with the United States that the FLRA's unfair labor practice jurisdiction over strike activities is not exclusive, but concurrent with that of the federal courts.

[10]A notice of appeal has only recently been filed in the third case, *United States* v. *PATCO Local 504*, Nos. 81-2145, 81-2146 & 81-2147 (10th Cir.), and we therefore have not yet learned what questions PATCO will present for review in that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Amicus Brief

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IN THE

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OCTOBER TERM, 1981

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Petitioners,

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UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether jurisdiction to enjoin strike activity in the federal sector is vested exclusively in the Federal Labor Relations Authority by Title VII of the Civil Service Reform Act of 1978.

2. Whether injunctive relief against federal sector strike activity is available under 5 U.S.C. § 7311.

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36, consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO, files this brief as *amicus curiae* in support of the petition for a writ of certiorari filed by

Petitioner, Professional Air Traffic Controllers Organization.

INTEREST OF THE AMICUS CURIAE

The American Federation of Government Employees, AFL-CIO (AFGE) is an unincorporated association representing approximately 700,000 civilian employees of the federal government. AFGE is the largest labor organization of non-postal federal employees including the so-called blue collar, white collar and professional groups of employees located in nearly every major department and agency of the federal government. In its capacity as exclusive bargaining representative, AFGE negotiates personnel policies, presents grievances and complaints including court actions, and carries on legislative activity to improve the welfare of the employees it represents.

In ruling upon the jurisdiction of the Federal Labor Relations Authority and the federal Courts in an alleged strike situation, the U.S. Court of Appeals for the Seventh Circuit issued an opinion that is inconsistent with the intent of Congress in enacting the Civil Service Reform Act of 1978 and with specific provisions of that Act. The opinion will have the effect of judicially changing the legislative scheme designed by Congress to regulate federal sector labor relations. AFGE has a duty to see that the 700,000 federal employees it represents have their actions in the labor relations area governed in the manner Congress decided upon.

REASONS FOR GRANTING THE PETITION

The American Federation of Government Employees respectfully urges this Court to grant the petition for *certiorari* filed in this case. The petition raises important questions concerning federal sector labor relations. Beyond that, however, it presents important questions

regarding the federal government's right to seek to enjoin violations of the law in the absence of express Congressional authorization.

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE OF THE IMPORTANCE OF THIS CASE TO FEDERAL SECTOR LABOR RELATIONS.

The Seventh Circuit's decision in this case is the first court of appeals decision concerning the scope of the Federal Labor Relations Authority's jurisdiction. As such, it will have a major impact on the administration of labor relations in the federal sector. If this Court lets the decision stand, the probable result will be that the FLRA will be relegated to a subordinate role regarding federal sector strikes, in clear violation of Congress' mandate that the FLRA "provide leadership in establishing policy and guidance" as to federal sector labor relations. 5 U.S.C. § 7105(a)(1). The events of the recent alleged PATCO strike bear this prediction out. The government clearly placed its greatest reliance in attempting to stop the alleged strike on the suits filed in the name of the United States by the Department of Justice, and not on the procedure whereby the FLRA may enjoin suspected unfair labor practices pending administrative adjudication. 5 U.S.C. § 7123(d). The FLRA obtained a temporary restraining order against PATCO on the first day of the alleged strike, but its efforts were overshadowed by those of the Department of Justice.

What is even more serious, the decision of the Seventh Circuit may lead to serious disruption of the uniformity of the FLRA regulation of federal sector labor relations. This Court explained the importance of agency exclusive jurisdiction in matters of labor relations in *Garner v. Teamsters*, 346 U.S. 485 (1953). The Court stated that "[a] multiplicity of tribunals and a diver-

sity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . . [w]hen two separate remedies are brought to bear on the same activity, a conflict is imminent." *Id.* at 491, 498-99. The decision of the Seventh Circuit allowing suits by the Department of Justice against strikes by federal employees concurrently with identical suits by the FLRA creates a risk of inconsistent and potentially conflicting adjudications. In some instances the liability of the union may be clearcut. In others it may be more uncertain,[1] however, and a court might well come to a different conclusion than the Authority.

Moreover, the Seventh Circuit's rationale may not be limited to strikes. The court held that although the FLRA might ordinarily have exclusive jurisdiction over conduct constituting an unfair labor practice, its jurisdiction over strikes was not exclusive because striking "is not only an unfair labor practice but is also prohibited by a separate statute, 5 U.S.C. § 7311." Appendix to Petition for a Writ of Certiorari at 98a. Striking is not the only unfair labor practice that may be illegal under a separate source of law, however. For example, an agency's discrimination in hiring or promotion on the ground of union membership might well constitute an unfair labor practice under 5 U.S.C. § 7116(a)(2), and a violation of the First Amendment. If the Seventh Circuit's decision is allowed to stand, therefore, the "exception" to the FLRA's jurisdiction that the court created may come to constitute the rule.

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[1] See *New York-New Jersey Council Local 3369, American Federation of Government Employees and Social Security Administration*, 4 FLRA No. 22 (August 29, 1980) (sixty employees left their desks to present formal protest about working conditions to supervisor; incident lasted three to six minutes; *held*, illegal work stoppage).

II. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE IMPLICATION OF RIGHTS OF ACTION IN FAVOR OF THE GOVERNMENT.

Even if the FLRA's jurisdiction over federal sector strikes is held not to be exclusive, there will remain the question whether injunctive relief against strikes is available. The statute regarding federal employee strikes does not expressly provide for judicial enforcement; it simply states that "[a]n individual may not accept or hold a position in the Government of the United States. . . . if he . . . . participates in a strike . . . . against the Government of the United States. . . ." 5 U.S.C. § 7311. The only right of action available to the United States, therefore, is an *implied* right of action. Cf. *Cort v. Ash*, 422 U.S. 66 (1975).

A panel of the Third Circuit recently held that the analysis this Court has developed in the area of implied private rights of action applies to implied governmental rights of action as well. *United States v. City of Philadelphia*, 644 F.2d 187, 191-92 (3d Cir. 1980).[2] The Seventh Circuit's decision in the instant case does not follow that analysis, and is to that extent inconsistent with the decision in *City of Philadelphia*. The instant case presents this Court with an opportunity to resolve that conflict and to consider the effect of its recent "implication doctrine" decisions, *e.g.*, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), on government litigation.

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[2] The court held there that the United States had no implied right of action to sue to prevent violations of individual's constitutional rights; the United States apparently has not petitioned this Court to review that decision.

CONCLUSION

For the reasons stated herein, and for the reasons stated in the Petition for a Writ of Certiorari, this Court should grant a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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BRIEF OF PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL

The Public Service Research Council respectfully moves for leave to file the annexed brief *amicus curiae.** In support of this motion, the Council states:

Public Service Research Council is an independent national citizens' organization engaged in nonpartisan research and education concerning public service unionism and its effects upon the nation's governmental institutions and their services to all Americans. It is a voluntary association of private citizens, legislators, scholars, and

* Pursuant to Rule 36 of the Rules of this Court, Public Service Research Council requested consent from the parties to the filing of a brief *amicus curiae* in this case. Counsel for petitioners has stated that he does not object to this filing, while the Solicitor General of the United States has consented in writing. These letters of the parties have been filed with the Clerk of the Court.

commentators united by a common concern with the maintenance of limited, constitutional government. With over 900,000 members, the Council is the nation's largest citizens' organization concerned exclusively with curbing the abuses of public sector unions in the United States. Public Service Research Council's request for leave of Court to file the annexed brief as *amicus curiae* is in furtherance of its continual effort to achieve its stated goals.

Because of the Council's above stated fundamental concerns, it has been active as a friend of the court at all levels of the legal process to affect evolving concepts of law in connection with various matters in the public interest and has filed briefs *amicus curiae* in *National League of Cities, et al.* v. *Hon. Peter J. Brennan* and *State of California* v. *Hon. Peter J. Brennan,* Supreme Court of the United States, Nos. 74-878 and 74-879; *Commonwealth of Virginia* v. *The Board of Supervisors of Arlington County, et al.* and *Commonwealth of Virginia* v. *The County School Board of Arlington County, et al.,* Supreme Court of Appeals for the Commonwealth of Virginia, Nos. 18747 and 18748, 1976; and *Pacific Legal Foundation and Public Employees Service Association* v. *Edmund G. Brown, Jr., Public Employees Relations Board, and Kenneth Cory* and *People of the State of California* v. *Edmund G. Brown, Jr., State Personnel Board, and Kenneth Cory,* Court of Appeal of the State of California for the Third Appellate District, 3 Civil No. 18364 and 3 Civil No. 18412, 1979. Most recently, the Council filed briefs *amicus curiae* in *United States of America* v. *Professional Air Traffic Controllers Organization, et al.,* United States District Court for the District of Columbia, Civil Action No. 81-1805; *United States of America* v. *Professional Air Traffic Controllers Organization, et al.,* United States District Court for the Eastern District of Virginia, Civil Action No. 81-0763A; and *Air*

Transport Association of America, et al. v. *Professional Air Traffic Controllers Organization, et al.*, United States District Court for the Eastern District of New York, No. 70-C-400.

Movant believes that the positions it is advancing, particularly the arguments relating to the statutory language regarding Title VII of the Civil Service Reform Act of 1978, and its public policy arguments, will not be fully argued to the Court by the parties in the instant case. Such arguments are contrary to the positions of the Petitioners. Respondent United States could not be expected to argue certain of these matters. The underlying issues in the instant case being of vital public interest and Public Service Research Council being interested in providing additional assistance and views to this Court as *amicus curiae*, movant respectfully requests that its motion for leave to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

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BRIEF OF PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

This brief *amicus curiae* on behalf of the Public Service Research Council is filed contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of the Public Service Research Council is set forth in its foregoing motion for leave to file a brief as *amicus curiae.*

SUMMARY OF ARGUMENT

Petitioners argue that Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135, raises serious questions as to the jurisdiction of federal district courts over strike activity in the federal sector because

(1) the statute established an administrative agency (Federal Labor Relations Authority) in which exclusive jurisdiction over federal sector unfair labor practices is vested, and (2) the statute established a comprehensive administrative scheme to regulate federal sector labor-management relations, including strikes.

Petitioners make these arguments even though (1) there is no statutory provision in Title VII which specifically vests exclusive jurisdiction in the Federal Labor Relations Authority over federal sector strike activity, and, indeed, the statutory language indicates just the opposite; (2) the legislative history relating to Title VII demonstrates that Congress did not intend that exclusive jurisdiction over federal sector strike activity vest with the Federal Labor Relations Authority; and (3) a separate and independent federal statute, 5 U.S.C. § 7311,[1] prohibits federal employee strike activity and permits the Government, in order to enforce that statute, to seek an injunction against such strike activity directly through a suit initiated by the Department of Justice, invoking the general grant of jurisdiction in 28 U.S.C. §1345.[2]

---

[1] 5 U.S.C. § 7311 provides in part:

> An individual may not accept or hold a position in the Government of the United States . . . if he — . . .
>
> (3) participates in a strike, or asserts the right to strike, against the Government of the United States. . . .

[2] 28 U.S.C. §1345 provides:

> Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. Title VII Of The Civil Service Reform Act Did Not Repeal Or Vitiate 5 U.S.C. § 7311

Section 7311 of Title 5, United States Code, is the latest in a series of statutes through which Congress has prohibited strikes by federal employees and mandated the termination of striking federal employees. This provision appeared initially as a rider to an appropriation statute, the Third Deficiency Appropriation Act of 1946, Pub. L. No. 79-521, 60 Stat. 571. Thereafter, the provision was included in all regular, deficiency, and supplemental appropriation acts, with only three exceptions, until 1955. In 1947 a similar provision was enacted as part of the Labor Management Relations Act (Taft Hartley Act), Pub. L. No. 80-101, 61 Stat. 136, and again in 1949, Pub. L. No. 81-171, 63 Stat. 408.

In 1955, Congress consolidated the antistrike provisions of the appropriations acts, Housing Act, and Taft Hartley Act, into a single, permanent statute by enacting Pub. L. No. 84-330, 69 Stat. 624. The current version of the antistrike statute is the result of the 1966 codification of Title 5, Pub. L. No. 89-554, 80 Stat. 378.

In contrast, Title VII of the Civil Service Reform Act of 1978 was designed to provide for a permanent, statutory framework for labor-management relations in the public sector, a matter which theretofore had been covered by Executive Order. There is no express provision of Title VII which alters the effect of 5 U.S.C. § 7311 or vests exclusive jurisdiction with the Federal Labor Relations Authority over federal sector strike activity.

The two statutes in question here, Title VII and 5 U.S.C. § 7311, were thus designed to accomplish different purposes. Section 7311 was designed to protect the public by prohibiting and punishing federal sector strike activity, and allowing its swift judicial termination, while Title VII was designed to establish the ground rules for public sector labor relations. At no time in the Congress' consideration of Title VII did it demonstrate an intent to allow labor-management guidelines to repeal or vitiate the purpose and effect of the protection of the public contained in 5 U.S.C. § 7311.

Moreover, Congress, by specifically incorporating by reference 5 U.S.C. § 7311 into the definition contained in Section 701 of Title VII, 5 U.S.C. § 7103(a)(2),[3] further demonstrated an intent not to vest exclusive jurisdiction with the Federal Labor Relations Authority over strike activity in the federal sector, for this incorporation evinces a knowledge and awareness by Congress of the ramifications and viability of that independent federal statute, and reflects an intent not to preempt that statute with the provisions of Title VII.

As Congressman Eldon Rudd (R-Ariz.) stated on the House floor when introducing his amendment which inserted the Section 7103(a)(2)(v) provision into the Title VII legislation:

> By adding this exclusion, we will remove any doubt about the intent of this Congress and this legislation with regard to strikes by Federal employees. The effect of this amendment is straightforward. An employee who strikes is no longer eligible to work for the Federal Government. *Such a person would no*

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[3] Five U.S.C. § 7103(a)(2)(v) states, in part: ". . . 'employee' . . . does not include . . . any person who participates in a strike in violation of section 7311 of this title."

> *longer enjoy the protections and benefits of this legislation. This provision is consistent with the penalties already contained in title 5 of the United States Code. It is, in fact, more lenient than the provisions of title 18, which allows fines and imprisonment for strikers.* [124 Cong. Rec. H9640 (daily ed. Sept. 13, 1978) (remarks of Rep. Rudd) (emphasis added).]

Immediately after being offered, this amendment was accepted without further debate.

II. The Legislative History Of Title VII Demonstrates That Congress Did Not Intend To Vest Exclusive Jurisdiction With The Federal Labor Relations Authority Over Federal Sector Strike Activity

It is apparent from the legislative history of Title VII that Congress was well aware of the existence and applicability of 5 U.S.C. § 7311, and the ramifications of that statute on striking federal employees and labor organizations of employees who violate its provisions. Indeed, this legislative history demonstrates that Congress did not intend to vest exclusive jurisdiction over federal sector strike activity with the Federal Labor Relations Authority.

During the Congressional debate on Title VII, this very issue was addressed in the following colloquy between Congressman William D. Ford (D-Mich.) and Congressman John N. Erlenborn (R-Ill.):

> Mr. Ford: . . . *That statute* [5 U.S.C. § 7311] *is not affected by this law at all, or by this bill, rather, so the act of striking will continue to be a violation of federal law.*
>
> The difference is that *this bill* for the first time *will add on top of that* a specific procedure available to the Government to go after a labor organization which advocates strike activity by making that an unfair labor practice reachable in the same way that any other unfair labor practice committed by the union or its

> representatives is reached by the statute, *so that, in fact, we did not affect the existing law on strikes. We add a remedy for the Government* in the case of someone advocating an illegal strike. . . .
>
> Mr. Erlenborn: Mr. Chairman, let me understand this. Is the gentleman suggesting that this bill, being a later enactment, would not be considered to be a repeal of the current law . . .?
>
> Mr. Ford: If the gentleman will yield further, Mr. Chairman, title 18 of the United States Code 1918 provides criminal penalties against strikes in violation of 5 United States Code. Five United States Code prohibits the strike. Title 18 makes participating in the illegal strike a crime. *Neither of these titles is affected by any of the provisions in this act.*
>
> Mr. Erlenborn: I thank the gentleman for his contribution. [124 Cong. Rec. H9455 (daily ed. Sept. 11, 1978) (emphasis added).]

As pointed out by petitioners, it seems apparent from the legislative history that Congress intended to model the Federal Labor Relations Authority after the National Labor Relations Board. Equally apparent, but not pointed out by petitioners, is that Congress was well aware of the important differences between the role of government in private sector strike activity and its role in federal sector strike activity. Most significant among these differences is that strike activity is clearly illegal in the federal sector; it is not illegal in the private sector. Limiting district court jurisdiction in federal sector strikes should not be effected unless clear, specific Congressional language and intent to do so can be demonstrated. This has not been done.

III. Public Policy Dictates That The Government Not Be Required To Depend Solely On The Provisions Of Title VII With Respect To Federal Sector Strike Activity

Strike actions by federal employees are always against the public interest. This is precisely their purpose. Indeed, the ultimate objective of such concerted actions is to disrupt the orderly and efficient delivery of vital federal services. By causing damage through such disruption to the government and citizens who rely on these employees, striking workers attempt to coerce the government and the public to accede to their demands. Such actions constitute an attempted intimidation of the American people. By their very nature, these strikes are intended to cause undue hardship and damage to the public.

As the recent strike by federal air traffic controllers so persuasively demonstrates, a nationwide strike by federal workers can be so devastating that it severely limits the ability of the government, as well as the private sector, to operate and function.

To be certain, a slowdown or strike action by air traffic controllers, even for just a short period of time, could be extremely disruptive to private and commercial interests, the public, and the orderly movement of the mail and other time sensitive shipments traveling in intrastate and interstate commerce. Moreover, such an action seems particularly callous when viewed in light of the possibility of human tragedy in the nation's skies. As the Court stated in *Air Transport Association of America* v. *Professional Air Traffic Controllers Organization*, 453 F. Supp. 1287 (E.D.N.Y. 1978), in focusing on the fact that the victims of such strike actions are members of the public:

> In addition to the essential public services which the defendants provide, they are, I am sure, mindful of

> the fact that they have the lives of many thousands of people in their hands on each and every one of their working days. The Court does not even wish to entertain the notion at this time that one would wilfully trifle with such awesome responsibility in such a way as might possibly jeopardize the lives of one or more members of the innocent traveling public. [453 F. Supp. at 1294.]

The responsibilities of air traffic controllers include the direction and control of aircraft traffic in the vicinity of airports and along airways to provide adequate and safe separation between aircraft, including clearance and instructions with respect to entry into and navigation through control areas, landings and take-offs, and otherwise promoting the safe operation of aircraft and airports. *See, Delta* v. *United States,* 561 F.2d 381 (1st Cir. 1977).

Because of the great potential for damage and disruption, Congress and the courts have consistently recognized the unfair burden on the public of strikes by federal employees, and have declared that such actions are against public policy. Severe sanctions are provided to protect the public against such intimidation.[4] The reason for Congressional prohibition of such strikes was reiterated during the Congressional debate on Title VII:

> The primary reason for Government services is to supply the public with certain essentials of life which cannot reasonably be supplied by the average citizen

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[4] 18 U.S.C. §1918 contains criminal penalties for the violation of the prohibitions of 5 U.S.C. § 7311:

> Whoever violates the provision of section 7311 of title 5 . . . shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

> himself, or to him by private enterprise. . . . Because these services are essential to the health, welfare and safety of the public, . . . it becomes intolerable that they be interrupted. [124 Cong. Rec. H9651 (daily ed. Sept. 13, 1978) (remarks of Rep. Rousselot).]

Consequently, unlike the other unfair labor practices set forth in Title VII, federal sector strike actions must be dealt with swiftly and firmly in order to protect the public and ensure an effective and efficient government. This is possible if the government can continue to proceed under 5 U.S.C. §7311 as it has in the past. It will not be possible, however, if the government must proceed against such strike activity *solely* pursuant to the timely and burdensome provisions of Title VII. As the Circuit Court below so adequately stated:

> . . . as a matter of policy *the United States must have the option to seek immediate injunctive relief from the district court* to avoid the emergency that a paralyzing strike at O'Hare Airport would likely create. The magnitude of harm to our national economy and to the security of air travelers that a strike might cause are valid reasons for the United States to avoid, if it chooses, seeking temporary relief through the FLRA procedures. Those procedures could be both lengthy and abortive. First, an investigation must be undertaken; upon its completion, the General Counsel must decide whether to issue a complaint against the offending party. Once these steps have been completed, the General Counsel may seek a temporary restraining order in the district court. His decision about whether to go to court is not only unilateral, but, of greater importance, is unreviewable. [Citation omitted.] An internal slowdown or strike by air traffic controllers at O'Hare Airport is too fraught with dire consequences to the public to confine the United States to the procedures as set out in the FLRA. Policy considerations dictate that

> the Government be able to consider whether more prompt relief can be afforded by an alternative procedure. [107 LRRM at 3061 (emphasis added).]

The fact that the size, structure, and cumbersome procedures of the FLRA make it ill-equipped to protect the public interest in strike situations demonstrates further that the FLRA was never intended to serve the function petitioners would have it serve.

CONCLUSION

There is no conflict among the circuit courts on the questions presented in this case. Nor has the Court below departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. It has provided a very well-reasoned opinion on the issues presented. For these reasons and the foregoing reasons presented in this brief, the Council submits that the writ should be denied.

Respectfully submitted,

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